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DOCUMENTAL HISTORY
OF LAW CASES
AFFECTING
JAPANESE
IN THE UNITED STATES
1916-1924

IN TWO VOLUMES

VOLUME I
NATURALIZATION CASES AND CASES
AFFECTING CONSTITUTIONAL
AND TREATY RIGHTS

COMPILED BY
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PART I
NATURALIZATION CASES

TABLE OF CONTENTS

PART I. NATURALIZATION CASES.

CHAPTER I. OZAWA CASE.

IN THE UNITED STATES DISTRICT COURT, TERRITORY OF HAWAII.	
1. Minutes of Court.....	1
IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.	
2. Brief for Appellee.....	9
IN THE UNITED STATES SUPREME COURT.	
3. Brief for Petitioner, by David L. Withington.....	17
4. Brief Filed by the Attorney-General of the State of California as <i>Amicus Curie</i>	52
5. Brief for the United States, by James M. Beck, Solicitor-General	101
6. Decision of the Court.....	115

CHAPTER II. YAMASHITA AND KONO CASE.

IN THE UNITED STATES SUPREME COURT.	
1. Brief of Petitioners, by C. S. Shank.....	122
2. Brief for Petitioners, by George W. Wickersham.....	130
3. Brief for Respondent, by L. L. Thompson.....	142
4. Decision of the Court	175

CHAPTER III. SATO CASE.

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA.	
1. Decision of Appellate Court.....	176
2. Petition for a Hearing by the Supreme Court, by Albert H. Elliot	182
3. Decision of the Court.....	204

CHAPTER IV. TOYOTA CASE.

IN THE MASSACHUSETTS DISTRICT COURT.	
1. Opinion	211

PART II. CASES AFFECTING CONSTITUTIONAL AND TREATY RIGHTS.

CHAPTER I. ALIEN POLL TAX TEST CASE (TERUI CASE).

IN THE CALIFORNIA SUPREME COURT.	
1. Brief on Behalf of Petitioner, by Albert H. Elliot.....	215
2. Oral Argument of Attorney-General U. S. Webb.....	237
3. Opinion of Court.....	248

CHAPTER II. JUNK BUSINESS TEST CASE.

IN THE WASHINGTON SUPERIOR COURT.	
1. Affidavit for Writ of Mandamus.....	257
2. Findings of Fact and Conclusions of Law.....	261
3. Judgment	270

CHAPTER III. DECISIONS OF CASES ON FOREIGN LANGUAGE ACT.

IN THE UNITED STATES SUPREME COURT.	
1. Meyer Case	271

CHAPTER III—IN THE UNITED STATES SUPREME COURT—Continued.

2. Bartels Case	274
3. Japanese Language School Case, T. H.....	276

CHAPTER IV. ASAKURA CASE.

(Pawnbroker Test Case.)

IN THE WASHINGTON SUPREME COURT.

1. Decision of the Supreme Court, State of Washington.....	280
--	-----

IN THE UNITED STATES SUPREME COURT.

2. Appellant's Brief, by Guie & Halverstadt.....	283
3. Brief of Defendants in Error.....	317
4. Decision of the Court.....	341

PART III. APPENDIX.

CHAPTER I.

The Constitution of the United States.....	347
--	-----

CHAPTER II.

Naturalization Laws of the United States, 1924.....	361
---	-----

CHAPTER III.

Immigration Act of 1924.....	380
------------------------------	-----

CHAPTER IV.

Japanese-American Treaty.....	396
-------------------------------	-----

CHAPTER V.

Abstract of Treaties and Conventions Entered Into Between the United States Government and Foreign Governments in Reference to Property Rights of Foreign Subjects.	
---	--

Austria	402
Brazil	402
Congo	403
Dominican Republic	403
Great Britain	404
Guatemala	404
Hesse	405
Honduras	405
Italy	406
Madagascar	406
Mexico	407
Morocco	407
Nassau	407
Netherlands	408
Orange Free State	408
Ottoman Empire	408
Paraguay	409
Peru	409
Portugal	409
Salvador	410
Serbia	410
Sweden	411
Switzerland	411
Two Sicilies	412
Venezuela	412
Wurttemberg	413

CHAPTER I.—OZAWA CASE.

IN THE UNITED STATES DISTRICT COURT, TERRITORY OF HAWAII.

MARCH 25, 1916.

1. MINUTES OF COURT.

Order of filing of opinion, etc. Clemons, Presiding Judge.

From the Minutes of the United States District Court, vol. 9, part 2, Saturday, March 25, 1916, page 1158.

On this day came the United States by its district attorney, Mr. Horace W. Vaughan, and said petitioner in person, and this cause was called for decision. Thereupon the court read and filed its decision denying said petition. (25)

APRIL, A. D. 1916, TERM. No. 274.

In the matter of TAKAO OZAWA, a Petitioner for Naturalization.

March 25, 1916.

Aliens—Naturalization—Japanese—A person of the Japanese race born in Japan, is not eligible to citizenship under the naturalization laws. (Rev. Stat., sec. 2169.)

Petition for Naturalization.

Takao Ozawa, *per se*.

Horace W. Vaughan, United States district attorney, and J. W. Thompson, assistant United States attorney, opposed. (27)

This petition for naturalization is opposed by the United States district attorney on the ground that the petitioner, being, as the facts are, a person of the Japanese race and born in Japan, is not eligible to citizenship under Revised Statutes, section 2169, which limits naturalization to "free white persons," and those of African nativity and descent. The other qualifications are found by the court to be fully established, and are conceded by the Government. Twenty years' continuous residence in the United States, including over nine years' residence in Hawaii, graduation from the Berkeley (Cal.), high school, nearly three years' attendance at the University of California, the education of his children in American schools and churches, the maintenance of the English language in his home, are some of the facts in his behalf. And he has presented two briefs of his own authorship, in themselves ample proof of his qualifications of education and character. He makes the main points that in the statute the word "white" is not used to exclude any race at all, or, in other words, is used "simply to distinguish black people from others" and that even in a narrow sense of the word "white" the Japanese are eligible to citizenship. Also as to the word "free" in the expression "free white persons," the contention is made that this word designates the quality of person and implies goodness, worthiness, excluding only improper persons.

The first contention is regarded by the petitioner as supported by the learned opinion of Judge Lowell in the case of *In re Halladjian*, 174 Fed. 834. A brief discussion of this opinion is therefore called for, and may serve to enforce our own conclusions. The syllabus of the case reports the court as holding: (28)

"That the word 'white' was used to classify the inhabitants and to include all persons not otherwise classified, not as synonymous with 'Euro-

pean', there being in fact no 'European' or 'white' race as a distinctive class, or 'Asiatic' or 'yellow' race, including substantially all the people of Asia; and hence the term 'free white persons' included Armenians born in Asiatic Turkey.

This is a broad ruling, and although a ruling was required only as to the eligibility of Armenians, it may appear even broad enough to divide the eligible classes into Africans and all others, subject, of course, to the exception, created by a statute of later date, in the case of Chinese. Without questioning Judge Lowell's conclusion that Armenians are eligible to citizenship, it seems that he goes too far in saying, *Id.*, 843, that:

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the Government to designate persons not otherwise classified."

His citation, for example, of the classification of the Massachusetts census of 1764, which included only whites, negroes, mulattos, Indians, and "French neutrals," and that of the Rhode Island census of 1748, which included only whites, blacks, and Indians would be far from proof that Oriental races, particularly the Japanese, or even the indefinite race or races, were included or thought of at all. The most that would naturally be inferred from the use of the word "white" as a "catch-all," as Judge Lowell characterizes it, *Id.*, 843, is the inclusion therein of all unclassified inhabitants then in the country and not as a rigid classification to endure for all time and to include particularly persons of the Oriental races or of the so-called "yellow" races, who, as will be seen, have at all times under accepted classifications been regarded as ethnologically distinct from the white race. And the fact that as occasion arose, from the presence of a noticeable number of Chinese or (29) Japanese, these newcomers received in the census reports a special classification, weakens very much the extreme view which may be implied from Judge Lowell's opinion. If the word "white" was a catch-all, why was its use not generally continued, to include these later immigrants? Judge Lowell's opinion itself shows that when the Oriental population, as represented first by the Chinese, came to be appreciable, beginning with the census of 1860 (i. e., at the first opportunity after the census of 1850), the word 'white' ceased to be used as a catch-all to designate those people, but they were specially classified by race. (*Id.*, 844; also 482, quoting from the Eleventh Census, Part I., p. xciv.) The fact that such classification was adopted as our population of Oriental peoples became appreciable, belies Judge Lowell's statement, 174 Fed. 843-844, that "after the majority of Americans has come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as 'white.' Too much is not to be inferred from the use of the words 'white' and 'black' and 'negro', in early times when these were undoubtedly the only, or practically the only, classes here other than the Indians. Nor is undue credit to be given to even much later, and recent census classifications, which were 'not uniform in all parts of the country.'" *Id.*, 842-843, or where much was left to the discretion of the director of the census, *Id.*, 843. Far more reliance may fairly be placed upon the considered judgments of courts, rendered at least as early as 1878, or perhaps 1854, in contested cases, upon the judgments of those whose peculiar duty it was to determine the meaning of this word "white."

Such a comprehensive meaning of the word "white" as that contended for would include Indians, yet the Supreme Court (30) in 1884 did not regard the statute, Revised Statutes, section 2169, as so broad. See *Elk vs.*

Wilkins, 112 U. S. 94, 104; also the considerably earlier case of *Scott vs. Sanford*, 19 How. 393, 420, which says: "Congress might * * * have authorized the naturalization of Indians, because they were aliens and foreigners." If Indians were excepted, then why not also the races of the Orient, who, though since found to be more adaptable to our manners and customs, were in the earlier days regarded as strange peoples, of manners and customs, incompatible with ours? The fact that more lately we have come to better appreciate that, in the language of William Elliott Griffis ("The Japanese Nation in Evolution," 24):

"There is no necessary distinction between the Oriental and Occidental, the brown man and the white man. That the 'yellow brain' and the Japanese heart are ultimately different from those of the Yankee or the Briton is the notion of tradition, not the fact of science."

does not justify the setting aside of an interpretation well established prior to the date of any of the cases, an incomplete list of fourteen which is submitted by the petitioner—there being, it is understood, about fifty in all—of Japanese who have been naturalized by state and federal courts. The earliest of these fourteen cases, that of Seizo Matsumoto, naturalized by a court of Pierce County, Washington, is as recent as January, 1896, two years later than the case of *In re Saito*, 62 Fed. 126, and sixteen or more years subsequent to two cases which took a view broad enough to exclude Japanese: *In re Camille*, 6 Fed. 256, and *In re Ah Yup*, 1 Fed. Cas. 223, No. 104. Indeed, as early as 1827, Chancellor Kent inclined to the same opinion as the two cases just cited; for he says in his Commentaries, vol. 2, page 72:

"The act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume this excludes the inhabitants (31) of Africa, and their descendants; and it may become a question to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, or the yellow or tawny races of the Asiatics, and it may well be doubted whether any of them are 'white persons' within the purview of the law."

And in 1854 the dictum of Chief Justice Murray of California in *People vs. Hall*, 4 Cal. 399, 403, 404, is that "the word 'white' has a distinct signification, which *ex vi termini* excludes black, yellow, and all other colors."

In the case of *Ah Yup*, *supra*, in holding that Chinese are not white persons, Circuit Judge Sawyer in 1878 said:

"The word 'white' person, as well argued by petitioner's counsel, taken in a strictly literal sense, constitutes a very indefinite description of a class of persons, where none can be said to be legally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But those words, in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race.

"In speaking of the various classifications of races, Webster in his dictionary says, 'The common classification is that of Blumenbach, who makes five: 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of Western Asia: 2. The Mongolian or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian or negro (black) race, occupying all Africa, except the North; 4. The American or red race, containing the Indians of North and South America; and 5. The

Malay or brown race, occupying the islands of the Indian Archipelago, etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: '1. European, whitish; 2. American, coppery; 3. Asiatic, tawny; and, 4. African, black.' Culiver makes three: Caucasian, Mongol and negro. Others make many more, but no one includes the white or Caucasian, with the Mongolian or yellow race, and no one of those classifications, recognizing color as one of the distinguishing characteristics, includes the Mongolian in the white or whitish race. See New American Encyclopedia, tit. 'Ethnology.' (32)

"Neither in popular language, in literature, nor in scientific nomenclature, do we ordinarily, if ever, find the words 'white persons' used in a sense so comprehensive. Yet, in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. I am not aware that the term 'white person', as used in the statutes as they have stood from 1802 till the late revision, was ever supposed to include a Mongolian. While I find nothing in the history of the country, in common or scientific usage, or in legislative proceedings, to indicate that Congress intended to include in the term 'white person' any other than an individual of the Caucasian race. I do find much in the proceedings of Congress to show that it was universally understood in that body, in its recent legislation, that it excluded Mongolian.

"* * * Whatever latitudinarian construction might otherwise have been given to the term 'white person', it is entirely clear that Congress intended by this legislation to exclude Mongolians from the right of naturalization."

This case was determined four years before the enactment of a special statute prohibiting the naturalization of Chinese. (22 Stat. 53, 61.) It is quoted at length to include its review of the then prevailing race classifications.

In 1880 in *In re Camille*, *supra*, 6 Fed. 257, Judge Deady approved of Judge Sawyer's view above quoted, though the case involved not a person of an Oriental race but one of Indian blood. See also the specific reference to the Chinese, *Id.*, 258.

In 1894, Circuit Judge Colt, in the case of *In re Saito*, *supra*, rules directly on the eligibility of Japanese. He says:

"The history of legislation on this subject shows that Congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute it was again restored for the very purpose of such exclusion.

"The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

"From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races. (33)

"And this is true from a scientific point of view. Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies in the foundation of the classification which scientists have adopted."

Judge Hanford in the case of *In re Buntaro Kumagai*, 163 Fed. 922, 924, is of the opinion that:

"The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarcation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

He cites in support of this opinion the cases of *Ah Yup* and *Saito*, *supra*, and also the case of *In re Yamashita*, 30 Wash. 234, 70 Pac. 42 (1902). His opinion is followed in the case of *In re Knight*, 171 Fed. 299, in which the applicant was one-quarter Japanese and one-quarter Chinese, and in which Judge Chatfield holds, *Id.*, 300, that neither Chinese nor Japanese can be naturalized—though, it is true, it was only necessary for him to hold, for the purposes of this case, that the substantial element of Chinese blood was sufficient to exclude the petitioner, regardless of the eligibility of Japanese. And in circuit court of appeals of the Fourth Circuit in *Bessho vs. United States*, 178 Fed. 245, and Judge Cushman in *In re Young*, 198 Fed. 715, held expressly that Japanese aliens are ineligible to citizenship.

To meet any argument that the enactment of a special statute prohibiting naturalization only of Chinese implies the eligibility of the Japanese, who are not included in any special prohibition, reference is made to *In re Kanaka Niau*, 21 Pac. 993-994, 6 Utah 259 (1889), and *Bessho vs. United States*, 178 Fed. 245, 248 (circuit court of appeals); also in *in re Ah Yup* (34), 1 Fed. Cas. 224, decided as above noted, before the enactment of the special prohibition against Chinese, *In re Saito*, 62 Fed. 127, and *Fong Yue Ting vs. United States*, 149 U. S. 698, 716.

As against these authorities, no reported case is known in which a person of the Japanese race has been naturalized, in which the court has rendered a written opinion to justify its ruling or in which there has been a contest to evoke the most thorough consideration. There are recent judicial opinions, that the statute in its present form is not to be "construed in the light of the knowledge and conception of the legislators who passed the original statute in 1790, without regard to the more definite and special knowledge and conception which must be attributed to the legislators who, upon reconsideration of the whole subject, enacted subsequent statutes including that now in force." (*Dow vs. United States*, 226 Fed. 145, 147.) See also *In re Mudderi*, 176 Fed. 465, 467, and a learned opinion of Judge Morrison of the superior court of California, rendered May 7, 1914, in the case of *In re Sakharan Ganesh Pandit*. But in the *Dow* case, for example, in using the language just quoted and in referring to more recent legislation, had in mind the legislation of 1875, in which the words "free white persons," omitted by error from the revision of 1873 (62 Fed. 127), were restored. (226 Fed. 147.) And, aside from the circumstances that the decisions just referred to were dealing with border-line cases of races closely related to what may be loosely called the "European", who were perhaps in 1780 here considered as the only white people (226 Fed. 145, 147, 148), it is of most practical importance to bear in mind that the ethnological divisions which classed the Japanese as of Mongolian or yellow race were what the legislators (35) of 1875 and the courts thereafter, down even to the present, have had to rely upon as their guides. See quotation in *In re Ah Yup*, *supra* (1878), from Webster's Dictionary, probably the most widely circulated work in America except the Bible, and even the very recent edition of the Encyclopedia Britannica, 11th Ed., vol. 9, page 851. This classification was undoubtedly well known in this country early in the last century, as it was in Germany before 1790, the date of the original enact-

ment of the statute. Even if, as the petitioner contends, Blumenbach's classification is unscientific (see *In re Dow*, 213 Fed. 355, 358, 359, 365; *In re Mudarri*, 176, Fed. 466, 467), nevertheless it has not yet been superseded so far as to assimilate the Japanese with what for many years, at least as early as 1854, and especially before 1875, has been generally regarded as the "white" race.

Tylor, one of the highest authorities, in his book of 1881, "Anthropology" (Appleton's Ed. 63, 96-98), points out that the Japanese have characteristics of the "Mongolia type of man" in which one prominent feature is that "their skin is brownish yellow." The most recent encyclopedia authority, 9 Enc. Brit. 11th Ed. (1910), 851, classes the Japanese as Mongolic or yellow, though placing the Ainos, a small element of the people of Japan, as Caucasian or white. See also 15 *Id.* 165. In addition to this unobstructed current of authority reference may be had to a very late work, "A History of the Japanese People," by Captain F. Brinkley, included by Dr. William Elliott Griffis in a list of the English scholars, who "have made obsolete most of the old European learning about Japan." "The Japanese Nation in Evolution," 20.

"The Japanese are of distinctly small stature. * * * Their neighbors, the Chinese and the Koreans are taller. * * * Nevertheless, Professor Dr. Baelz, the most eminent authority on this subject, avers that 'the three great (36) nations of Eastern Asia are essentially of the same race', and that observers who consider them to be distinct 'have been misled by external appearances.' (Brinkley, History, etc., *supra*, 57-58, see also 59, 60.) That the Japanese have, however, an element of white, Caucasian or Iranian, blood is noted. (*Id.*, 58, see also 45-54-55.)"

Another recent book may be quoted as giving the opinion of a Japanese educator, "The Life and Thought of Japan," by Okakura Yoshisaburo (published by E. P. Dutton & Co., 1913):

"And as to these swarms of immigrants from China and Korea, who crossed the sea at various periods in the early days of Japanese history, it did not take many generations before they came to adopt the views of the people with whom it was their interest in every way to get mixed, and thus they lost their own identity. In this manner, notwithstanding an extensive admixture of foreign elements to our original stock, we find ourselves as closely unified a nation as if we had been perfectly homogeneous from the beginning. One and the same blood is felt to run through our veins, characterized by one and the same set of religious and moral ideas. This may perhaps be due to the fact that the three elements—the conquering, the conquered, and the immigrating—belonged originally to the same Mongolian race, with very little trace of any mingling of Ainu and Malayan blood." (*Id.*, 48, 49.)

"You will come, at least to some extent, to acknowledge the truth of the statement so often made in books on Japan, that there are two distinct racial face types among the present Japanese. * * * Be it remembered that both these types are Mongol. Both have the yellowish skin, the straight hair, the scanty beard, the broadish skull, the more or less oblique eyes, and the somewhat high cheek-bones, which characterize all well-established branches of the Mongol race." (*Id.*, 41.)

"The relation here displayed between the living and the departed may be considered as a characteristic of the Mongolian race, to which both the Japanese and the Chinese belong." (*Id.*, 54.)

Whether these views just quoted are wholly accurate or not, I do not undertake to say. They are, at all events, in line with the statements of

scientific works which have been, as already intimated, the guides of our courts in all cases known to have been contested or in which the court rendered a written opinion, even though recognizing that there is in the Japanese an element of white blood. See reference to Brinkley, *supra*.

Dr. Griffis' interesting book, in a broad spirit of (37) tolerance, notable in one for forty years in the closest touch with Japan and for some years a resident there, goes far to demonstrate the conclusion that "the Japanese are not Mongolian." ("The Japanese Nation in Evolution," 400.) Rev. Dr. Doremus Scudder, of Honolulu, who is himself intimately acquainted with the Japanese people, and who may be termed a friend of the court, has submitted in behalf of the petitioner this authority as tending at least to support the view that the Japanese are "white persons" even in a narrow sense of those words. But Dr. Griffis, after all, does not seem to be at variance with the common authorities on ethnology. It is plain that he is speaking of the later development of the Japanese away from all that is narrow in the sense of "Mongolic," or "Oriental"—of their "both deserving and winning success" (*Id.* 400), in competition, or rather comparison, with the most progressive and enlightened peoples of the world. He recognizes the Mongolic element constantly. "White men, belonging to the great Aryan family and speaking a language akin to the Indo-Germanic tongues, were the first Japanese, who are a composite and not a pure 'Mongolian' race. Their inheritance of blood and temperament partakes of the potencies of both Europe and Asia." (*Id.*, 1, also 21, 25, 349.) He also recognizes the Malay element, which, at least "the Malay peoples of the Eastern Archipelago," the last edition of the Encyclopedia Britannica includes in the Mongolic or yellow division of the races, though "less typical but with the Mongolic elements so predominant as to warrant inclusion." Says Dr. Griffis, *Id.*, 30: "Those most familiar with the races, the Mongol, Aryan, and the Malay, now so differentiated, consider that in the Nippon composite the Malay strain predominates." (38)

Also *Id.*, 30-31 *et seq.* Though Dr. Griffis believes that "the basic stock of the Japanese people is Aino" (a white people) "* * * by 'basic stock' * * * meaning the oldest race in the islands" (*Id.*, 1, also 1), yet he speaks of the Ainos as having been "crowded out" (*Id.*, 9)—elsewhere characterizing the process as absorption, not elimination (*Id.*, 26); and Brinkley, History, etc., *supra*, 56 (see also 44), notes the "steady extermination for twenty-five centuries" of the Ainu element, characterized by him as having "left as little trace in the Japanese nation." (*Id.*, 58.)

Intelligent men, of course, agree with Dr. Griffis that the words "Mongolian" and "Oriental," as mere epithets, can bear no sense of unworthiness or inferiority in the case of the Japanese people.

A few words are called for by the cited examples of the Magyars of Hungary and of the very dark Portuguese, who are both freely admitted to citizenship, in spite of the fact that the former are Mongolic in origin and that the latter are, in a strict sense of the word, not "white." Many of the decisions admit the difficulties inherent in the statutory classification, and even Judge Lowell has declared that he "greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in section 2169." (*In re Mudarri*, 176 Fed. 465, 467.) Indeed in this latter case his language seems to cast doubt upon the practicability of the rule applied in the Holladjian case. He says, 176 Fed. 467:

"No modern theory has gained general acceptance. Hardly anyone classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend

to draw; e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying (39) and conflicting classifications of persons in the usage of successive generations and of different parts of a large country."

But the examples just cited may be regarded as exceptional. Centuries before our first legislation on naturalization, the Magyars had "become physically assimilated to the western peoples." (17 Enc. Brit., 11th Ed., 393, 394.) "In their new environment their Mongolic physical type has gradually conformed to the normal European standard." (Webster's New International Dictionary [1913], tit. "Magyar," quoting A. H. Keane.) They have long been "one of the dominant people of Hungary—which they conquered at the close of the ninth century," *Id.*, and they, with the Portuguese of varying degrees of color, are within the meaning of "white," as commonly understood, and as explained by Judge Cushman, in the case of *In re Young*, 198 Fed. 716, 717:

"The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

"It is just as certain that, whether we consider the Japanese as of Mongolian race or the Malay race, they are not included in what are commonly understood as 'white persons'."

See, also, *Dow vs. United States*, 226 Fed. 145, 147.

Though the intent of the word "white" is determinative of the case, we may well dispose of the petitioner's argument that the use of the word "free" in the expression "free white persons" emphasizes the element of worthiness, good quality, as against the element of color. The use of the word "free" in the debates in the Constitutional Convention in 1787 affords most reliable evidence of what the word meant at about and shortly before its first use in the naturalization laws. It is recorded that Gouverneur Morris in moving to insert "free" before the word "inhabitants," with reference to the apportionment (40) of members of the House of Representatives, used the word as the opposite of "slave." (Madison's Journal of the Constitutional Convention [Albert Scott & Co., Chicago, 1893], 478.) And such has always been its intent, not only when this statute had its origin but shortly after the Civil War, when the statute was revised after a brief suspension—though the retention of the word "free" had then become unnecessary.

As lately as 1906 Congress went over the whole law of naturalization, and yet in the face of the well-known rulings of the published decisions which had interpreted the particular section here in question, the section was left just as it was. This is a very persuasive reason for the conclusion that Congress acquiesced in, and adopted, the interpretation which the courts had put upon its own work. (226 Fed. 145, 148.) The remedy for uncertainty in the statute, or for its unfairness or inconsistency with the theory and spirit of our institutions, lies, of course, with the legislative body.

In view of the foregoing authorities and considerations, the court finds that the petitioner is not qualified under Revised Statutes, section 2169, and must therefore deny his petition; and it is so ordered, in spite of the

finding hereby made that he has fully established the allegations of his petition, and, except as to the requirements of section 2169, is in every way eminently qualified under the statutes to become an American citizen.

CHAS. F. CLEMONS,
Judge of the United States District
Court for the Territory of Hawaii.

TAKAO OZAWA, Appellant, vs. THE UNITED STATES OF AMERICA,
Appellee.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 2888.

2. BRIEF FOR APPELLEE. FACTS.

This case was brought here from the district court of Hawaii on appeal from a decree denying the petition for citizenship of appellant, Takao Ozawa.

The record discloses that appellant is of the Japanese race and born in Japan. There was only one question raised and decided in the court below. Was the appellant eligible to citizenship under our naturalization laws, he being of the Japanese race and born in Japan?

The court, in a very able and exhaustive opinion upon the interpretation of our naturalization laws, held that he was not; that a native of Japan was not qualified for citizenship under the Revised Statutes, section 2169.

The record discloses that there were other material grounds in which the court could have denied the said appellant's petition and the Government now urges that these grounds be considered by this court for, if the theory upon which the lower court based its decree is wrong, the appellate court will affirm the decree of the trial court if it finds in the record any reason which it considers sound, even though the district judge may have rejected that reason and rested his decree on some other ground.

(*Smiley vs. Barker*, 83 Fed. 687; *Baker vs. Kaiser*, 126 Fed. 319; *Dean vs. Davis*, 212 Fed. 88.)

The record shows that appellant filed declaration of intention on the first day of August, 1902 (Tran., p. 4), and filed his petition to be admitted a citizen of the United States, October 16, 1914 (Trans., p. 9). It will be noted that over twelve years had expired between the filing of his first and last papers and over seven years from the time the Act of June 29, 1906 (34th Stat., part 1, p. 596), went into effect, to the filing of his petition for citizenship, or his last papers, as they are frequently called.

Subsection 2 of section 4 of the Act of June 1906 reads in part:

"Not less than two years nor more than seven years after he has made such declaration of intention, he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition shall applicant state his full name, his place of residence, etc."

The courts have frequently held that this section of the statute is mandatory and if citizenship is granted, when not in compliance with this section, that it is illegally procured and should be set aside. It has been argued that the law of June 29, 1906, is not applicable to those declarations of intentions that were made prior to the passage of the act, but this is not the construction of the law in the decisions of the higher courts.

The case of *Yunghauss vs. U. S.*, 218 Fed. 169, circuit court of appeals for the second circuit said:

"A declaration made prior to the Act of 1906 is valid, no matter how long prior thereto it may have been made, but after date of the passage of that act the person who made the declaration has no superior rights to one who declares thereafter. In both cases action must be taken within the seven years. It seems to us that this is what Congress intended. In effect the act says to the alien who has made his declaration prior to 1906:

"Your declaration is in all respects valid, but if you wish to become a citizen you cannot delay your application for a period of over seven years from the passage of the act."

The cases sustaining this view are: *In re Wehrli* (D. C.), 157 Fed. 938; *In re Goldstein* (D. C.), 211 Fed. 163; *Harmen vs. U. S.*, 223 Fed. 425.

The opposing view is clearly stated by Judge Orr in *Eichhorst vs. Lindsey* (D. C.), 209 Fed. 708, and by Judge Maxey in *Re Anderson* (D. C.), 214 Fed. 662.

The case of *Eichhorst vs. Lindsey*, referred to above as opposing the views here taken by the Government, and against the views of the circuit court of appeals, of the first and second circuits, was decided by Judge Orr of the United States district court. The same question came before him in the case of *U. S. vs. Lengyel*, 220 Fed. 724, in which the court said:

"This court has already expressed its views against such a construction of the act in the case of *Eichhorst vs. Lindsey*, 209 Fed. 708, resting more particularly upon the fundamental principle that an act of a legislative body should not be construed as retroactive, unless the language employed expresses a contrary intention in unequivocal terms."

It would seem that the holding of the Supreme Court in the case of *Johannessen vs. U. S.*, 225 U. S. 243, relative to the same subject pertaining to section 15 of the same act, would warrant the same construction upon paragraphs 1 and 2 of section 4 of the act.

In a very recent case, *United States of America vs. Solomon Louis Ginsberg*, the Supreme Court said, speaking by Mr. Justice McReynolds:

"No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in section fifteen and demand its cancellation unless in accordance with such requirements. If procured when prescribed qualifications have no existence in fact, it is illegally procured; a manifest mistake by the judge cannot supply these nor render their existence nonessential."

Returning now to the issue made and determined in the lower court, as to whether the applicant is a white person within the purview of section 2169, R. S., which reads as follows:

"The provisions of this title (naturalization) shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent.

"The limiting words 'free white persons' were used in the first naturalization law passed in this country, approved March 6, 1790 (U. S. Stat. L., vol. 1, pp. 103 and 104), and, with the exception of the period from 1873 to 1875, have been continued in the various statutes passed respecting naturalization. (The excepted period will be referred to later on in this brief.)

"To ascertain the true construction of the term 'white persons' it is necessary first to refer to the reason for their adoption, the period and condition prompting them, the reason for their subsequent retention, and thereafter to dispose of the question of whether ethnology, anthropology, and the words 'Caucasian' and 'Aryan' are pertinent to the issue.

Every statute must be construed with reference to the object intended to be accomplished by it. (35 Cyc. 1106.)

"The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature. (36 Cyc. 1106.)

"A statute must be construed with reference to the time of the passage thereof, or with reference to its going into effect. That meaning must be given to words which they had at the date of the act, and descriptive matter therein must refer to things as they existed at the time of its passage. (26 Amer. and Eng. Enc. Law, 611.)

"A thing within the intention of the legislature in framing a statute is often as much within the statute as if it were within the letter. (*Rigney vs. Plaster* [C. C.], 88 Fed. 689.)

"The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*U. S. vs. Union P. R. Co.*, 91 U. S. 79.)

"In accordance with the maxim "*Expressio unius est exclusio alterius*", when a statute enumerates the things upon which it is to operate or forbids certain things it is to be construed as excluding from its effect all those things not expressly mentioned. (36 Cyc. 1122.)

"In the interpretation of statutes words in common use are to be construed in their natural, plain and ordinary signification, unless it can be shown that they are used in technical sense. (36 Cyc. 1114; *In re Saito*, *supra*.)

"The term 'white person' must be given its common or popular meaning. (*In re Young* [D. C. O.], 198 Fed. 716.)

History records that the founders of these United States were from the north of Europe, and were white people in every sense that the words imply. Their customs and usages are too well known to need elaboration, and suffice it to say that slavery was permitted in some of the colonies, many of these slaves being white men from Europe. The indenture of this class was due to various causes, but it was recognized by the colonists that the disqualifications of these white men might in time be removed. After regaining their freedom these men were permitted a voice in the Government, and in all respects were on a par with the other white freemen. All of the foregoing references to history leads up to the statement that the Congress in 1790 recognized in this class the same type that they themselves were, and in the use of the term 'free white persons' it was this class it was designed to cover. The same did not appeal to them, however, so far as the mixed races and blacks were concerned, and the law was framed solely to retain the control of government in the white people who had founded the country, or in people, who like themselves, were from Europe.

At the time the legislature was originally framed it was generally taught that there were four races, the white, yellow, red and black, and regardless of so-called discoveries and wholly artificial terms used by ethnologists, and incidentally in dispute among them, within comparatively recent times the general teaching has been the same.

After the Thirteenth and Fourteenth Amendments to the Federal Constitution were adopted, the former prohibiting slavery and the latter declaring who shall be citizens, Congress, in the Act of July 14, 1870, amended the naturalization laws by adding the following provisions: "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." (16 Stat. 256, sec. 7.)

Upon the revision of the statutes in 1873, the words "free white persons" were omitted, probably through inadvertence. Under the Act of February 18, 1875, to correct errors and supply omissions, this section of the statute was amended by inserting or restoring these words.

"In moving to adopt this amendment in the House it was stated that this omission operated to extend naturalization to all classes of aliens and especially to Asiatics * * *. The debate which followed proceeded on the assumption that by restoring the word 'white' the Asiatics would be excluded from naturalization, and the motion was adopted with this understanding of its effect." (3 Cong. Rec., pt. 2, p. 1081; *In re Saito*, 62 Fed. 187.)

Note particularly the words "African nativity" and "African descent". They no more aptly describe the negro than "white" does to the European, and yet we know that negroes alone were intended. That leaves outside the pale of eligibles to American citizenship under its naturalization laws the Asiatics, not by direct legislation, as in the case of Indians, but by necessary inference, from the fact that whites and blacks are alone given the benefit of our naturalization laws. In other words, the term "white" as used by "the fathers" was a convenient general designation that would sufficiently describe Europeans. Europeans were most nearly allied of all races to those who established this free government, for which reason there was less danger to the interests established by incorporating into the body politics of Europeans than would result from the introduction of people who were more remote, not simply in their origin or in the tinting of their complexion but in their ideals and standards, from those for which the colonists had made such sacrifices, and had incurred much risks.

If ethnology were the true test under section 2169, R. S., of an applicant's admissibility to citizenship, it is but proper to state that the court would be confronted with the question of what school of ethnology or what so-called expert's views it should take. The disputes and changes among the ethnologists themselves are too well known to comment upon and their classifications in many instances, if accepted as the test, would bar from American citizenship peoples from Europe who today are accepted as "white persons" and admitted by the courts. The so-called Finns are generally classed by ethnologists as a part of the yellow race. Whatever the origin of these peoples, their admission to citizenship, and it is no inconsiderable amount, has never been opposed for the reason that their customs, ideals and standards, and characteristics so closely conform to those of the founders of this country, whether the cause be their blending with new peoples or whatever it may be, that they are considered as desirable acquisitions and embraced within the term "white persons".

If anthropology were to have a bearing on the question the courts would always be confronted with the necessity for differentiating between those inhabitants of India who call themselves Hindus, Parsees, Brahmans, Sikhs, and other natives of India or so-called Hindus with whom they have been living and marrying during the past twelve hundred years, or to call upon an anthropological expert to assist. The tides of immigration which have swept back and forth across the continents of Europe and Asia have to a large extent altered racial characteristics, due to intermarriage, climate conditions and other causes, and have in many instances almost totally obliterated the original contours and strains.

Judge Thompson rendered an opinion on September 24, 1912 (198 Fed. 688), in the case of *In re Alverto*, holding that the petitioner, a native

of the Philippines, whose paternal grandfather was a Spaniard and who married a native woman, the petitioner's father, who was born in the Philippines, also having married a native Filipino woman, could not be admitted to citizenship because not within the provisions of section 2169, R. S., and dismissed the application.

The simpler and better course, supported by decisions and in the interests of the welfare of this country, would be served if the question of color and racial characteristics were disregarded and the demarcation went simply to the question of whether the alien is of that class contemplated by Congress, to wit, the Europeans who were furnishing the sinews which have resulted in the progress and advancement of this nation.

The question of color is regarded as inconsequential, because if the term "white person" were to be construed with regard to this alone, a person of lily white color, regardless of any other fact, would have a decided advantage over a decided brunette, however much the latter might be within the terms of the act. If the question of whether the birthplace of the forefathers of this applicant for centuries back is to control, it might well be asked whether the term "white person" could be limited to any person seeking American citizenship. It is not an individual that the court has to deal with in this instance, but with a class, "Japanese," which from time almost immemorial has lived under totally different ideals, standards, customs, and usages from those of the framers of this legislation and those of us to whom the term is generally accepted as applicable. It is inconceivable that Congress should have intended to open the doors of citizenship to Asiatics, who, for the reasons referred to above, could never, should they come to this country, be assimilated into the body politic, and with regard to whom ethnologists are wholly at variance.

The words "Caucasian" and "Aryan" are treated of in *Ex parte Shahid*, 205 Fed. 812, so thoroughly that they are set forth below as sufficient for the purpose of covering this phase of the question at issue. In this case the following authorities were examined by the court: *In re Ah Yup*, 5 Sawy. 155 (Fed. Cas. 104); *In re Camille* (C. C.), 6 Sawy. 541 (6 Fed., 256); *In re Gee Hop* (D. C.), 71 Fed. 274; *In re Rodriguez*, (D. C.), 81 Fed. 337; *In re Kumigai* (D. C.), 163 Fed. 922; *In re Knight* (D. C.), 171 Fed. 299; *In re Najour* (C. C.), 174 Fed. 735; *In re Halladjian* (C. C.), 174 Fed. 834; *In re Muddari* (C. C.), 176 Fed. 465; *Bessho vs. U. S.* (C. C. A.), 178 Fed. 245 (101 C. C. A.); *In re Balsara* (C. C.), 171 Fed. 294 (C. C. A. 180 Fed. 694); *In re Ellis* (D. C.), 179 Fed. 1002.

The court then states (at p. 814): "After considering them all in an attempt to evolve, if possible, some definite rule for judicial decision, the conclusion that this court has arrived at is as follows: That the meaning of free white persons is to be such as would naturally have been given it when used in the first Naturalization Act of 1790. Under such interpretation it would mean by the term 'free white persons' all persons belonging to the European races, then commonly counted as white, and their descendants. It would not mean a 'Caucasian' race, a term generally employed only after the date of the statute and in a most loose and indefinite way."

The term "Caucasian" obtained much currency in the pro and anti slavery discussions between 1830 and 1860, but later and more discriminating examination and analysis has shown its entire inapplicability as denoting the families or stocks inhabiting Europe and speaking either so-called Aryan or Semitic languages. Nor would "free white persons" mean an "Aryan" race, a word of much later coinage, and practically unknown to common usage in 1790, and one still more indefinite than Caucasian, and which

would exclude all Semitics, viz., Jews and Arabians, and also all Europeans, such as Magyars, Finns and Basques, not included in the Aryan family. It would not mean "Indo-European" races, as sometimes ethnologically at the present day defined as including the present mixed Indo-European, Hindu, Malay, and Dravidian, inhabitants of East India and Ceylon; nor the mixed Indo-European, Dravidian, Semitic and Mongolian peoples who inhabit Persia. It would mean only such persons as were in 1790 known as white Europeans, with their descendants, including as their descendants, their descendants in other countries to which they have emigrated, such as the descendants of the English in Africa or Australia, or the French and Germans and Russians in other countries. At page 815 the court continues: "In 1790 the distinctions of race were not so well known or carefully drawn as they are today. At that date all Europeans were commonly classed as the white race, and the term 'white' persons in the statute then enacted must be construed accordingly. To hold that a pure-blooded Chinaman, because born in England or France, was included within the term, would be as far-fetched as to hold that a pure-blooded Englishman, Irishman, or German born in China was excluded."

"The modern Bengalee or Parsee or Persian may be partly Indo-European descent. The ancient Zend and Vedic writings apparently emanate from a fair-complexioned, light-haired, if not blue-eyed people. The speakers of Sanskrit, who conquered Hindustan, or the speakers of the ancient Zend, who conquered Persia, were probably in that category. But in India the conqueror seems to have been soon swallowed up in an enormously preponderant brown or black people of different race, and in Persia the same result followed in a degree afterwards accentuated by the terrible Mongolian or Tartar invasions which destroyed whole communities, replacing them by pure Mongolians. In most Asiatic countries the governing or controlling element or strain is apparently that of a dark-colored people, not of European descent. * * *

"In the face of all these difficulties it is safest to follow the reasonable construction of the statute as it would appear to have been intended at the time of its passage, and understand it as restricting the words 'free white persons' to mean persons as then understood to be of European habitancy or descent."

Continuing on page 816, the court says: "The geographical interpretation that 'free white persons' means persons of European habitancy and descent is at least capable of uniform application, and gives to the statute a construction that avoids the uncertainties of shades of color and invidious discriminations as to the race of individuals."

Chancellor Kent as early as 1827 (2 Kent Comm. 72) stated that it might well be doubted whether the copper-colored natives of America or the yellow or tawny races of the Asiatics are white persons within the purview of the law.

This view seems to be fully in accord with the following cases, some of the applicants being of the same race as the appellant: *In re Saito*, 62 Fed. 126; *In re Dow*, 213 Fed. 355; *In re Camille*, 6 Fed. 256; *In re Takuji Yamashita*, 70 Pac. 482; *In re Young*, 195 Fed. 645; *In re Young*, 198 Fed. 715.

It is argued by the appellant's counsel that the Act of June 29, 1906, is complete in itself and is not limited or restricted by section 2169 of title XXX, R. S.

The Act of June 29, 1906, is not complete except in so far as is expressed by its terms. It provides for "a uniform rule for the naturalization of aliens throughout the United States" and sets forth the "manner" in which an

alien may become a citizen of the United States, but it does not include or purport to include all the laws of the United States relating to the naturalization of aliens and in that sense is not a complete act of naturalization. It did not supersede and was not intended to supersede any of the laws relating to the naturalization of aliens except those set forth in section 26 of said act, including all acts or parts of acts inconsistent with or repugnant to said act or any portion thereof.

This seems to be the construction of the court in the case *In re Alverto*, 198 Fed. 690, in which the court said:

"The Naturalization Act of 1906 expressly repealed many of the then existing provisions of law in relation to naturalization. Section 2169 was not repealed, and, if Congress had not intended its provisions to apply to section 30 of the Act of 1906, such intention would naturally appear in the act. As it has not excepted section 30 of the act from the provisions of section 2169, Revised Statutes, the latter section must be held to be an applicable provision of the Naturalization Laws."

Section 2169 sets forth the races which may be naturalized and the Act of June 29, 1906, sets forth the manner, conditions and procedure under which the races which may be naturalized may secure admission to citizenship. Had it been intended to make the Act of June 29, 1906, a complete act of naturalization, it is fair to assume that the whole of title XXX of the Revised Statutes would have been repealed, and such sections thereof as it was desired to retain would have been re-enacted as a part of said act. As Congress repealed only certain sections of title XXX, it must be presumed that it was intended to leave the sections of title XXX which were not repealed as a part of the Naturalization Law in as full force and effect as before the enactment of the Act of June 29, 1906.

The Act of March 26, 1790, U. S. Stats. at L., vol. 1, pp. 103, 104, the first act providing for the naturalization of aliens, provided for the admission to citizenship only of "any alien being a free white person".

In the Act of June 29, 1895, vol. 1, pp. 414, 415, U. S. Stats. at L., the second Naturalization Act, it was again provided "that any alien being a free white person may be admitted to become a citizen of the United States or any of them on the following conditions and not otherwise * * *." This language was substantially repeated in the Act of April 14, 1802, vol. 2, pp. 153-155, U. S. Stats. at L.; in the Act of May 26, 1824, U. S. Stats. at L., vol. 4, p. 69, and in the Act of May 24, 1828, U. S. Stats. at L., vol. 4, pp. 310, 311.

In no act of Congress was any provision made for the naturalization of any other person than "an alien being a free white person" until Congress provided in section 7 of the Act of July 14, 1870, U. S. Stats. at L., vol. 16, p. 256, "That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

In the first edition of the Revised Statutes, 1873, all naturalization laws in effect at the date of the compilation were placed under title XXX and section 2169 thereof read: "The provisions of this title shall apply to aliens of African nativity and to persons of African descent." This was evidently an error which was promptly corrected by the Act of February 18, 1875, vol. 18, p. 318, U. S. Stats. at L., when said section 2169 was amended by inserting in the first line after the word "aliens" the words "being free white persons and to aliens"—thus making section 2169 read as incorporated in the Revised Statutes of 1878: "Inasmuch as no alien may be naturalized except under such conditions and limitations as may have been provided by Congress and as Congress, from the very first Naturalization Act passed in

1790 down through many succeeding acts until the Act of 1870, granted the privilege of naturalization only to aliens being free white persons" and then provided in section 7 of the Act of July 1870, "that the Naturalization Laws are hereby extended to aliens of African nativity and to persons of African descent." The law undoubtedly then was that no person except a free white person, a person of African nativity or African descent could be admitted to citizenship.

It was only for convenience that all the naturalization laws were assembled under one title in the Revised Statutes and section 2169 was made to read: "The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

Before the revision, as afterwards, only the persons named in section 2169 might be admitted to citizenship. It is apparent that as all naturalization laws were included in title XXX, in the revision the phraseology adopted in section 2169 was merely a convenient form of stating the then existing law and that there was no purpose to change the then existing law. It follows, therefore, that section 2169 was merely declarative of existing law which placed a limitation, as stated, on persons who might be naturalized. Since, when adopted, said section limited the naturalization of aliens to the classes of persons named therein, there could be no enlargement of the classes who might be naturalized except by subsequent enactment of Congress, and Congress has never seen fit to make such enactment.

As in 1878 the naturalization of aliens was restricted to the classes named in section 2169, there being no naturalization law not included in title XXX, we cannot assume that the classes who may be naturalized have been enlarged by the passage of subsequent naturalization laws, which do not mention the subject, but provide for a general rule of naturalization, the manner of naturalization and the procedure, in detail.

In providing under the Act of June 26, 1906, that an alien may be naturalized in the following manner and not otherwise, it cannot be held to mean that any alien may be so naturalized, but only an alien who under existing law may be naturalized in the manner and under the conditions only as stated. If it had been intended to enlarge the classes of persons who might be naturalized under such act, it is fair to presume that Congress would have said "any alien may be naturalized in the following manner and not otherwise," and this would have been followed by a repeal of section 2169.

The Act of June 29, 1906, did not touch or purport to touch the question of what classes may be naturalized, for that question was covered by section 2169 and the fact that said section was not repealed as were certain other sections of title XXX conclusively indicates that there was no intent to change the existing law as to who may be naturalized.

The courts have recognized the fact that section 2169 is not only a limitation on the unrepealed sections of title XXX, but on all subsequent naturalization acts by numerous decisions.

The so-called Navy Act of July 26, 1894, was passed after the revision of 1878 and was never made a part of title XXX, and yet in numerous cases the courts have held that applicants under said act are subject to the restrictions of section 2169. (*Bessho vs. U. S.*, 178 Fed. 245; *In re Alverto*, 198 Fed. 688; *U. S. vs. Balsara*, 180 Fed. 694.)

In conclusion we wish to say that the Government neither palliates nor denies the noble characteristics of the Japanese race as portrayed by appellant's counsels, but we respectfully submit that the argument would be more appropriate to the legislative department for its consideration than

the judicial, as it was said in the case of *U. S. vs. Ginsberg*, referred to above, relative to the naturalization law:

"Courts are without authority to sanction changes, modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare." Respectfully submitted,

JOHN W. PRESTON,

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ED. F. JARED,

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Attorneys for Appellee.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1918. No. 222.

3. BRIEF FOR PETITIONER, BY DAVID L. WITHINGTON.

This case comes here on a certificate from the United States circuit court of appeals for the Ninth Circuit, the case having come to that court, both on appeal and by writ of error, from a judgment denying the petition of said Takao Ozawa for citizenship.

At the trial in the United States district court of Hawaii the United States district attorney opposed the petition because Takao Ozawa, the petitioner, was of the Japanese race and born in Japan, and not eligible to citizenship under Revised Statutes, section 2169. The other qualifications were proved, found to be fully established, and conceded by the Government. The certificate continues:

"The applicant had for twenty years continuously resided in the United States, including the last nine years' residence in Hawaii. He graduated from the Berkeley, California, high school, and was for nearly three years a student at the University of California, until it was closed by the earthquake in 1906. He has educated his children in American schools and he and his family have attended American churches, and he has maintained the use of the English language in his home. He presented two briefs of his own authorship, which are ample proof of his qualification, by education and character.

"The court found that the contention of the United States district attorney is correct and that, although the applicant was eligible for citizenship in every other respect, yet having been born in Japan and being of the Japanese race, as a matter of law he was not eligible to naturalization, and denied the petition, to which petitioner excepted."

QUESTIONS OF LAW CONCERNING WHICH THE CIRCUIT COURT OF APPEALS DESIRES THE INSTRUCTION OF THIS COURT.

1.

Is the Act of June 29, 1906 (34 Stat. at Large, part 1, p. 596), providing "for a uniform rule for the naturalization of aliens," complete in itself, or is it limited by section 2169 of the Revised Statutes of the United States?

2.

Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?

3.

If said Act of June 29, 1906, is limited by said section 2169 and naturalization is limited to aliens being free white persons and to aliens of African

nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

These questions really are two in number, and restated, are:

1. Is the Act of June 29, 1906, complete in itself, and does it provide what it declares, "a uniform rule for the naturalization of aliens?"
2. If the Act of June 29, 1906, is limited by section 2169 so that naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, *under any circumstances* eligible to naturalization?

CANONS OF CONSTRUCTION.

The solution of the questions certified to this court is, we apprehend, governed by:

1. The constitutional direction to Congress to establish an uniform rule of naturalization, and the co-ordinate public duty to enact plain and adequate legislation to carry out this provision.
2. The course of legislation. What Congress has done to establish this uniform rule.
3. The general scope of that legislation, and the declared policy of the United States in converting aliens into citizens, involving the whole field of legislation in reference to immigration as well as naturalization, and the ascertainment of the class of aliens Congress has determined to be fit for citizenship.
4. Does the Act of June 29, 1906, establish a uniform rule of naturalization and is it complete in itself?
5. Where a statute which has had an accepted meaning is re-enacted, should words of the re-enacted statute be taken in their hitherto accepted sense?
6. In determining whether words are to receive the accepted sense of the original enactment, or their meaning at the time when re-enacted, is the fact that the words, taken in the latter sense, have no definite meaning, and that in judicial construction none has been found, persuasive that the meaning attached to them under the original enactment must be given.
7. Where the re-enactment purports to be a correction of an error in omitting the original enactment in a revision is this a further consideration for giving to the words their meaning at the time when originally enacted?
8. Should opinions of courts of inferior jurisdiction, although many in number, giving new constructions to the language of the re-enactment, be persuasive with the court, when based on no uniform rule, furnishing no common test, the rules in some cases based on race, in others on locality of origin, which test of locality and of race varies with the court, in determining a provision of law which deals simply with persons and with color, excepting so far as it applies to persons of African nativity and descent?
9. It should be assumed that Congress, in dealing with the great boon of citizenship in this land of the free and refuge of the oppressed, was frank and outspoken in its legislation and not sidestepping any difficulty or legislating by indirection where it feared to legislate directly.
10. The fact that the Japanese are a free people, that their root stock, like that of the Polynesian, is of the white race and that while Mongolian and Malay types are found amongst the Japanese, the Caucasian or white type is as prevalent.
11. The question is not whether some or most of the Japanese cannot

be naturalized, but whether all Japanese even if of the Caucasian or white race cannot be naturalized.

ARGUMENT.

I.

The Act of June 29, 1906, establishes a uniform rule of naturalization, and that rule is not controlled or modified by section 2169.

(a) *The constitutional grant of power, the title of the act, its scope and terms, show that, save in definitely excepted cases, it is a complete, exclusive and uniform rule of naturalization.*

Article I, section 8, of the Constitution of the United States provides:

"The Congress shall have power * * *

"To establish an uniform rule of naturalization * * *

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, * * *"

Chirac vs. Chirac, 2 Wheat. 259; *Dred Scott vs. Sanford*, 19 How. 393; *Boyd vs. Nebraska*, 143 U. S. 135; *United States vs. Wong Kim Ark*, 169 U. S. 649; *Johannessen vs. United States*, 225 U. S. 227; *Luria vs. United States*, 231 U. S. 9.

Congress exercised this power in the First Congress, in the second session, and passed the Act of March 26, 1790 (1 Stat. L. 103), entitled:

"An act to establish an uniform rule of naturalization."

This act was repealed by a like act with a like title in 1795, and that by the Act of April 14, 1802 (2 Stat. L. 153), which in turn was entitled:

"An act to establish an uniform rule of naturalization."

This in turn became title XXX of the Revised Statutes of the United States, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled:

"An act to establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

This court has said in construing an act defining its jurisdiction, which is derived from the Constitution:

"The Constitution and the laws are to be construed together." (*Duroseau vs. United States*, 6 Cranch 307.)

And of this very power this court said in the *Wong Kim Ark* case:

"The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as it respects the individual." (*United States vs. Wong Kim Ark*, *ubi supra*, p. 703.)

This act purports to be a complete act. It provides in section 3 for exclusive jurisdiction of naturalizing aliens, and in section 4, "that an alien may be admitted to become a citizen of the United States in the following manner, and *not otherwise*," followed by five paragraphs prescribing the conditions of admission, among which, in paragraph two, that the petition shall set forth "*every fact material to his naturalization and required to be proved upon the final hearing of his application*."

In section 27 the form of this petition is given, containing the allegations which Congress believed were "material to his naturalization and required to be proved," but nothing with reference to color or race.

The intent of Congress to enact a uniform rule, and that it had enacted a uniform rule, for naturalization, covering the entire subject and even giving to the rules and regulations the force of law, is clear. (*In re Brefo*, 217 Fed. 131.)

In a case in which it is held that the special provision as to naturalization in the Organic Act of the Territory of Hawaii (Act of April 30, 1900) was inconsistent with section 4 of the Act of June 29, 1906, and therefore repealed, the court say:

"The title of the act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. * * * There is no reason to presume that in enacting the later statute Congress intended to make special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the United States. There was no reason for bestowing special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States." (*United States vs. Rodiek*, 162 Fed. 469.)

It is interesting to note that Judge Gilbert in this case speaks of section 2169 (unrepealed) as a section "which extends the privilege of naturalization to aliens of African nativity and to persons of African descent."

"By this legislation a new and complete system of naturalization was adopted, all of the details of which, together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed." (*Bassho vs. United States*, 178 Fed. 245.)

In a case holding that section 2166 was not repealed it was said:

"The Act of June 29, 1906 (34 Stat. at L. 596), commonly called the 'Naturalization Law,' was intended to provide a uniform system for the naturalization of aliens." (*In re Leichtag*, 211 Fed. 681.)

"The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization." (*In re Mallari*, 239 Fed. 416; *Hampden County vs. Morris*, 207 Mass. 167, 93 N. E. 579, Ann. Cases 1912A, 815.)

"Prior to 1906 'the uniform rule of naturalization' authorized by the Constitution was found in the Act of 1802 (2 Stat. L. 153, chap. 28), and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook, by the Act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, Comp. Stat. 1913, sec. 963), to prescribe 'and fix a uniform system and a code of procedure in naturalization matters.' Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906." (*United States vs. Ginsberg*, 243 U. S. 472.)

This case was cited in a recent case in which the court held that a certificate of naturalization issued without filing the certificate of arrival as provided in section 4, subdivision 2, of the Uniform Act of June 29, 1906, was invalid, the court saying:

"A 'uniform rule of naturalization' embodied in a simple and comprehensive code under federal supervision was believed to be only effective remedy for then-existing abuses. And in view of the large number of courts to which naturalization of aliens was intrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be adduced." (*United States vs. Ness*, 245 U. S. 319.)

"The language there employed is comprehensive and emphatic. A 'uniform rule' is provided. 'An alien' may be admitted to citizenship in the manner prescribed, 'and not otherwise.'

"A wise public policy undoubtedly inspired the enactment of this law. Its intent, gathered from the unambiguous language employed, subjects all aliens to a public, drastic and thorough examination touching their qualifications for citizenship before that priceless boon is conferred upon them. It is not our province to thwart this public policy by reading unwarranted or doubtful exceptions into the act." (*United States vs. Peterson*, 182 Fed. 289, 291.)

To recapitulate, the Constitution grants to Congress the power "*To establish an uniform rule of naturalization.*" The various acts of Congress which have exercised this power from the act of the First Congress, March 26, 1790, have been and have purported to be acts "*To establish an uniform rule of naturalization.*" The Act of June 29, 1906, purports to be an exercise of the power granted by the Constitution, and purports to be an exhaustive exercise of that power and is complete in itself.

(b) *The unrepealed sections of title XXX and a few other special acts provide for naturalization in cases excepted from the uniform law.*

(1) *The decided cases so hold.*

Dealing hereafter with the effect of the Act of May 9, 1918, we observe that section 26, the repealing clause of the Act of June 29, 1906, does not specifically repeal sections 2166, 2169, 2170, 2171, 2172 and 2174 of title XXX, and it has been uniformly held, although the application of the rule is not uniform, that while the Act of 1906 is a general act, as it did not repeal specific sections of title XXX regulating the admission of special classes singled out for favor, the unrepealed portion stands covering these special cases. (*In re Buntaro Kumagai*, 163 Fed. 922; *In re Loftus*, 165 Fed. 1002; *United States vs. Meyer*, 170 Fed. 983; *In re McNabb*, 175 Fed. 511; *In re Leichtag*, *ubi supra*; *United States vs. Lengyel*, 220 Fed. 720; *In re Sterbuck*, 224 Fed. 1013; *In re Tancred*, 227 Fed. 329.)

"Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary were not required. This would be natural as to applicants who had actually been in the service of the United States and as to whose good character the officers of the United States had certified." (*In re Loftus*, *ubi supra*.)

(2) *An examination of these sections confirms this view.*

Section 2166, a re-enactment of the Act of July 17, 1862, passed during the Civil War, provides for the naturalization of honorably discharged soldiers without previous declaration and with but one year's residence, instead of five provided by existing law.

There is a similar provision, originally part of the Naval Appropriation Act of July 26, 1894, chapter 165, 28 Stat. L. 124, revised in the Naval Appropriation Act of June 30, 1914, chapter 130, 38 Stat. L. 395), providing for the naturalization of aliens who have served an enlistment in the United States Navy or Marine Corps, and have received an honorable discharge or an ordinary discharge with recommendation for re-enlistment, without previous declaration of intention, and by the latter act without proof of residence on shore, the honorable discharge or discharge with recommendation for re-enlistment to be accepted as proof of good moral character, the

service under the Act of 1894 being for five years and that under the Act of 1914 for four years.

Section 2169, under discussion, is specifically limited in its application to title XXX, of which it is a part.

Section 2170, not expressly repealed either by the Act of June 29, 1906, or by the Act of May 9, 1918, is *functus officio*, as its provisions are covered by the fourth paragraph of section 4 of the former act, and its requirement of residence for five years is inconsistent with section 2166, above referred to, and section 2174, authorizing the admission, as citizens, or seamen having served three years on board a merchant vessel, providing that such seamen after declaration of intention and three years' service shall be deemed citizens and for the purpose of manning merchant vessels and after the declaration be deemed American citizens for the purpose of protection.

Section 2171 is a hoary relic forbidding the naturalization of alien enemies, with reservations for those who had made declarations before the 18th day of June, 1812, or were entitled to become citizens without declaration, and the further proviso reserving the right to apprehend and remove alien enemies.

The remaining section, 2172, naturalizes the minor children of persons duly naturalized without restriction as to residence and contains a further hoary provision against those legally convicted of joining the army of Great Britain during the Revolutionary War, and another provision making children of citizens, though born out of the United States, citizens.

When the questions were certified to this court, title XXX applied to the Army, Navy, including the Marine Corps, to alien enemies, the children of persons naturalized and to seamen.

(c) *Section 2169 is not restrictive in terms, and if restrictive only applies to title XXX, Revised Laws, and the cases excepted from the general rule.*

(1) *The history of section 2169 shows that it was an enlarging and not a restrictive clause.*

The Act of July 14, 1870 (16 Stat. L. 256, ch. 254), declares:

"The naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

When the Revised Statutes were enacted, the words of the existing naturalization statute, Act of April 14, 1802, were:

"That any alien, being a free white person, may be admitted to become a citizen."

modified when incorporated in section 2165 so as to read:

"Section 2165. *An alien* may be admitted to become a citizen of the United States in the following manner, and not otherwise."

and the Act of July 14, 1870, was incorporated as a separate section, viz:

"Section 2169. The provisions of this title shall apply to aliens of African nativity and to persons of African descent."

When the act to correct errors in the Revised Statutes (Stat. 1875, c. 18, v. 18, p. 318) was passed, attention was called to the omission of the words "being free white persons" in section 2165, but instead of reinserting them in that section, section 2169 was amended to read as follows:

"Section 2169. The provisions of this title shall apply to aliens (being free white persons and to aliens) of African nativity and to persons of African descent."

Section 2169 as originally enacted is an enlarging and not a restrictive

declaration, and the introduction of the words "being free white persons and to aliens" does not change the provision from an enlarging to a restrictive one. There is nothing in the language used to show the intention of Congress to *restrict* naturalization to free white persons and Africans by this amendment. This inference, for it is nothing but an inference, is drawn entirely from the previous history of legislation and declarations on the floor of Congress, the uniform rule having previously provided only for the naturalization of "any alien being a free white person."

(2) *To hold otherwise naturalization from the passage of the Revised Statutes to the Amendatory Act of the 18th day of February, 1875, would be restricted to those of African nativity or descent.*

If section 2169 is restrictive, then as originally enacted in the Revised Statutes it was restrictive, and naturalization, until the passage of the act to correct errors, was restricted to those of African nativity or descent, which is incredible.

(3) *The Chinese Exclusion Act of March 6, 1882, supports this view.*

Congress evidently took this view that the words were not restrictive and that affirmative legislation was necessary to exclude the Chinese from citizenship, for it passed the Act of May 6, 1882, which provides:

"Sec. 14. That hereafter no state court or court of the United States shall admit Chinese to citizenship; and *all laws in conflict with this act are hereby repealed.*"

This after it had been held that the language of section 2169 excluded the Chinese (*In re Ah Yup* [1878], 5 Sawy. 155) and a half Indian (*In re Camille* [1880], 6 Fed. 256.)

(4) *In any event, section 2169 is applicable only to title XXX and does not apply to the Act of June 29, 1906.*

It is not necessary to rest the argument on the ground just discussed, for section 2169 is made applicable in terms only to title XXX, of which the Act of June 29, 1906, is not a part.

To hold that section 2169 is a restriction on the Act of June 29, 1906, which provides for a "uniform rule for the naturalization of aliens," requires not only the inference of a prohibition of the naturalization of other than free white persons and those of African nativity or descent from words which contain no such prohibition, but also making a section which declares that "*the provisions of this title shall apply*" to a restricted class of aliens, declare that the *provisions of the Act of June 29, 1906*, shall apply only to the same restricted class of aliens; not only converts that which is in terms an extension of the meaning of the act into a restriction, but also incorporates into a general law, purporting to contain the entire uniform rule for naturalization, a provision which is in, and restricted to, a title in another act, which act and which title have not been repealed. The more reasonable supposition is that Congress intended to retain section 2169 as a limitation on the specially excepted classes provided for in the unrepealed sections in title XXX, and that the general rule provided for in the Act of June 29, 1906, applied to all other aliens and was not to be restricted excepting as provided in that act. These conclusions, drawn from the general scope of the act, are reinforced by the express language of the Act of June 29, 1906, which declares, in the terms used in the previous general acts, omitting the words "being a free white person."

Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and *not otherwise.*" and then prescribes all the conditions of admission and provides for a petition setting forth "*every fact material to his naturalization and required to*

be proved," this form given for the petition containing no fact to show that the applicant is a free white person or that he is of African nativity or African descent.

(d) *The origin of the Uniform Act of June 29, 1906, shows that it was intended to be a complete scheme for naturalization, the test being "fitness for citizenship" with no discrimination against Japanese.*

The initiatory step in the legislation was an executive order issued in March, 1905, appointing a commission composed of an officer from the Department of State, Gaillard Hunt, from that of Justice, M. D. Purdy, and from Commerce and Labor, Richard K. Campbell, who submitted a report transmitted to the 59th Congress by President Roosevelt, who, in his annual message at the opening of the session, December 5, 1905, announced the appointment and referred to this commission and called attention to the recommendation "as to the importance of revising by appropriate legislation our system of naturalizing aliens." (Congressional Record, vol. 40, part 1, p. 99.) The same message also dealt with the subject of immigration, the President saying:

"The prime need is to keep out all immigrants who will not make good American citizens."

And again:

"In dealing with this question it is unwise to depart from the old American tradition and to discriminate for or against any man who desires to come here and become a citizen, save on the ground of that man's *fitness for citizenship*. It is our right and duty to consider his moral and social quality. His standard of living should be such that he will not, by pressure of competition, lower the standard of living of our own wage workers; for it must ever be a prime object of our legislation to keep high their standard of living. If the man who seeks to come here is, from the moral and social standpoint, of such a character as to bid fair to add value to the community he should be heartily welcomed. We cannot afford to pay heed to whether he is of one creed or another, of one nation or another. We cannot afford to consider whether he is Catholic or Protestant, Jew or Gentile; whether he is Englishman or Irishman, Frenchman or German, *Japanese*, Italian, Scandinavian, Slav or Magyar. What we should desire to find out is the individual man. In my judgment, with this end in view, we shall have to prepare, through our own agents, a far more rigid inspection in the countries from which the immigrants come. It will be a great deal better to have fewer immigrants, but all of the right kind, than a great number of immigrants, many of whom are necessarily of the wrong kind. As far as possible we wish to limit the immigration to this country to persons who propose to become citizens of this country, and we can well afford to insist upon adequate scrutiny of the character of those who are thus proposed for future citizenship" (p. 1).

And again:

"*The questions arising in connection with Chinese immigration stand by themselves*" (p. 101).

It will be observed that in this message, while the subject of Chinese immigration is dealt with at length and is said to stand by itself, it is expressly declared that there should be no restriction on *Japanese* immigration and that immigration should be limited as far as possible to future citizens, and the immigration restricted and scrutinized, with this requirement in view. In the proceedings in Congress there is no indication that Japanese were to be discriminated against either as to immigration or citizenship.

(e) *This policy announced by President Roosevelt has been steadily followed in legislation in respect both to naturalization and immigration, including the Act of 1917.*

These acts show that the policy of Congress is to exclude undesirable citizens and the Chinese and that Congress has refrained with great care from any action tending to place Japanese in the same class with Chinese.

(1) *These acts show the traditional policy of the United States to welcome aliens, modified only by restrictions against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race.*

Immigration precedes naturalization in natural and logical order. The same reasons which tend to restrict one operate on the other.

Up to the adoption of the Revised Statutes, by treaties and statutes, the immigration of aliens had been encouraged; the Alien Act of June 25, 1798, the one exception, was largely instrumental in sweeping the Federals from office and bringing in the Republican administration of Jefferson. That act "has ever since been the subject of universal condemnation." (Mr. Justice Field in *Fong Yue Ting vs. United States*, 149 U. S. 868.)

Since the Revised Laws, various acts have limited immigration, culminating in the Act of February 5, 1917. The earliest, that of March 3, 1875 (18 Stat. L., p. 477), is a limitation on the importation of women for immoral purposes, the supplying of coolie labor, and the entrance of alien persons under sentence for felonious crimes other than political.

By Act of August 3, 1882 (22 Stat. L., p. 214), convicts, lunatics, idiots or persons unable to take care of themselves were forbidden admission.

By Act of February 26, 1885 (23 Stat. L., p. 332), amended February 23, 1887 (24 Stat. L., p. 414), Congress reversed the policy of the United States, initiated by President Lincoln during the war, and prohibited the introduction of contract labor.

By Act of March 3, 1891 (26 Stat. L., p. 1084), there were added to the prohibited classes paupers, persons suffering from a loathsome or dangerous contagious disease, and persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also assisted immigrants.

By Act of March 3, 1903 (32 Stat. L., p. 1213), there were added epileptics, persons who had been insane within five years or who had had two or more attacks, professional beggars, anarchists, prostitutes, procurers, and those previously deported.

A comparison with the requirements in the Act of June 29, 1906, shows that Congress excluded from naturalization the same classes denied admission under the immigration law, with the exception of those suffering from physical infirmities, requirements against physical infirmities acquired in this country not being applicable to naturalization.

An examination of the laws in regard to race exclusion shows that numerous Chinese exclusion acts have been passed: May 6, 1882 (22 Stat. L., p. 58), July 5, 1884 (23 Stat. L., p. 115), October 1, 1888 (25 Stat. L., p. 504), September 13, 1888 (25 Stat. L., p. 476), May 5, 1892 (27 Stat. L., p. 25), November 3, 1893 (28 Stat. L., p. 7), June 6, 1900 (31 Stat. L., p. 588), March 3, 1901 (31 Stat. L., p. 1093), April 29, 1902 (32 Stat. L., p. 176), and April 27, 1904 (33 Stat. L., p. 394). The two latter acts extend exclusion to the island territory under the jurisdiction of the United States, but do not forbid the passage from one island to another, and provide for Chinese laborers, other than citizens, obtaining a certificate elsewhere than in Hawaii. In none of these laws is there any reference to any other

nationality than Chinese. To these can be added April 28, 1904 (33 Stat. L., 478), and June 23, 1913 (38 Stat. L., 4).

In Hawaii, by the joint resolution of July 7, 1898 (30 Stat. L., p. 751), further immigration of Chinese into the Hawaiian Islands was prohibited, and no Chinese was allowed to enter the United States from the Hawaiian Islands; and by the Organic Act of April 30, 1900 (31 Stat. L., p. 141), the Chinese were required to procure certificates under the Act of May 5, 1892.

The Act of March 3, 1891, committed to the commissioner-general the enforcement of the Chinese Exclusion Act, while the Act of March 3, 1893, provided that it should not apply to Chinese persons, and the 36th section of the Act of March 3, 1903, contains this provision:

"Provided, That this act shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent."

Inserted in order to preserve those laws from repeal (24 Op. Atty.-Gen. 706).

"The existence of the earlier laws only indicates the special solicitude of the Government to limit the entrance of Chinese." (*United States vs. Wong You*, 223 U. S. 67; *In re Dow*, 213 Fed. 355.)

Against this long line of statutes we place the fact that there is no line in any statute before or since 1875 which indicates any intention on the part of Congress to put the Japanese into the class with immoral, insane and other undesirable immigrants, or to class the Japanese with the Chinese or to discriminate against the Japanese in any way. We have traced the course of legislation along these two parallel lines and endeavored to show that the legislative mind ran in the same course, with no trace of intention to exclude the Japanese from admission or from naturalization.

The apparent exception in the acts forbidding the importation of coolies (R. C., secs. 2158 to 2163), originally enacted February 19, 1862 (12 Stat. L., 340), and the Supplemental Act of March 3, 1875 (18 Stat. L., 477), are but a prelude to the contract labor legislation beginning with the statute of February 26, 1885, and now found in the general Immigration Act of February 24, 1907 (34 Stat. L., 898), making it a misdemeanor to import contract labor, which covers the ground of all earlier acts.

This court in a recent case, in reviewing the history of the Immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers) who are undesirable as members of the community, even if previously domiciled in the United States. (*Lapina vs. Williams*, 232 U. S. 78.)

"That Congress has never contemplated or intended to confer the right of naturalization upon Mongolians, or natives of China, is palpable by a mere reference to the laws upon the subject of naturalization. Section 2169 of the Revised Statutes, under the title 'Naturalization,' reads:

"The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent."

"Mongolians, or persons belonging to the Chinese race, are not included in this act. This was the view held by Judge Sawyer, sitting on the circuit bench for this circuit (Ninth), *In re Ah Yup*, 5 Sawy. 155, Fed. Case No. 104, where the subject was very learnedly and elaborately discussed and considered. He says, in summing up his conclusions:

"Thus, whatever latitudinarian construction might otherwise have been

given to the term "white person," it is entirely clear that Congress intended by this legislation, to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of Congress."

"But if there could be any question as to the meaning of the provision above referred to with reference to Mongolians, the matter is settled and concluded by the imperative and unmistakable language of the Act of Congress of May 6, 1882, which says:

"'Hereafter no state court or court of the United States shall admit Chinese to citizenship.'

"That such is the law of the land and the policy of this country is explicitly recognized by article 4 of the convention between the United States of America and the Empire of China, which was duly signed and ratified, and, on December 8, 1894, proclaimed by the President. This article provides:

"'In pursuance of article 3 of the immigration treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghsii, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* * * *'" (*In re Gee Hop*, 71 Fed. 274-275.)

(2) *The Immigration Act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization.*

The Immigration Act of February 5, 1917, and the discussion of the bill in Congress show no intention of placing the Japanese in a class with the Chinese. Japan is expressly excepted from its provisions by a territorial limitation, done in deference to the Japanese Government. (See correspondence between Senator Phelan and Secretary of Labor Wilson, Congressional Record, December 13, 1916, p. 266.) As it came from the House, that bill, while making some small changes in excluded persons, particularly those afflicted with tuberculosis, was chiefly marked by two additional grounds of exclusion: one, the provision for which three Presidents of the United States had vetoed similar acts—the requirement that aliens over sixteen years of age, physically capable of reading, unable to read the English language or some other language or dialect, should be excluded, which finally became the law over the veto of President Wilson; the other, the inclusion in the excluded classes of:

"Hindus and persons who cannot become eligible, under existing law, to become citizens of the United States by naturalization, unless otherwise provided for by existing agreements as to passports, or by existing treaties, conventions, or agreements or by treaties, conventions, or agreements that may hereafter be entered into." (Congressional Record, p. 164.)

To this clause the Japanese Government objected, and the State Department requested the bill to be amended (Congressional Record, December 11, 1916, p. 165; and p. 235, Senator Lodge), and the bill was amended as follows:

"* * * unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the continent of Asia, situate south of the twentieth parallel latitude north,

west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States." (Sec. 3.)

Numerous amendments were offered to this clause. The Southern senators endeavored to exclude immigration of negroes, particularly from the West Indies; the members from the Pacific coast to exclude Orientals. All amendments were voted down, the West not voting with the South on the negro, and the South not voting with the West on the Asiatic.

There are frequent tributes in the debate to the Japanese nation; among others, that Japan has control of the Pacific Ocean, is a great naval and military power. (Senator Gallinger, p. 285.)

"As a matter of fact, I believe that Japan is one of the most efficient as well as one of the most powerful of nations. I recognize her great intelligence, I recognize her great efficiency in whatever walk of industrial life they seek to enter." (Senator Chamberlain, p. 226.)

"I have never claimed, neither do the people of the Pacific Coast claim, that the Japanese are an inferior race." (Senator Works, p. 228.)

"The Japanese feel that they are equal; in fact, they feel that they are our superiors, and in many respects they are. They are able, fit, thrifty, and shrewd." (Senator Lane, p. 231.)

"There are some 14,000,000 negroes in the South. They are spreading themselves all over the United States. Everybody admits that they are an inferior race to the Japanese.

"* * * The Senate has today and yesterday voted down half a dozen amendments to this bill to exclude negroes from immigration into the United States. Neither the Independent Senator from the State of California nor the Democratic Senator will dare to say that the Japanese are inferior to negroes, and yet we got no help. We asked for bread, and you gave us a stone. You are not willing to vote to exclude negro immigration from the West Indies.

"You stand around and smile and risk international complications with Japan on a race issue about the Japanese, who are as highly civilized as you are. * * *

"The Japanese are not a race of barbarians; they are not a race of veneered men; they are a race of people who have proven their ability to stand in the front ranks of civilization." (Senator Williams, pp. 388, 389.)

In the course of the debate, there are frequent statements that Japanese are ineligible to citizenship, but (pp. 234, 235) *Congress evidently did not know whether the Japanese were excluded or not.* Senator Lodge (p. 234) said:

"The only change from that bill which was vetoed (by President Wilson) was the insertion of the word 'Hindus'—'Hindus and persons who cannot become eligible under existing law.' The purpose of that was to exclude Asiatic immigration, Mongols having been held by the courts to be not eligible to naturalization."

But he goes on to say that this form of words was extremely offensive

to Japan. Senator Norris pushed Senator Lodge with the question why Japan objected to the language; they were either included or not included, either eligible or not eligible; and Senator Phelan asked, apropos of an amendment (not appearing in the enacted bill) in which "white persons" were added to the various status and occupations not excluded, what was meant by "white persons," saying that the Hindus claim, in naturalization proceedings, to be white persons of the Aryan race, to which Senator Lodge assented, saying:

"Well, by the use of the expression 'white persons' you have no protection whatever under the naturalization law" (p. 234); "that is not defined" (p. 334).

"Mr. Phelan. The Japanese claim that they are white persons; the Hindus claim that they are white persons. It is a very dangerous proposition.

"Mr. Lodge. Yes; they claim it, but it has not been so held. *I think it is a danger involved in the naturalization law, which is the foundation of the whole thing* (p. 234).

"Mr. Lodge. Nobody has ever claimed that Mongolians were of the white race.

"Mr. Phelan. The Japanese dispute that they are Mongolians.

"Mr. Lodge. They may do so, but it has never been held by our courts that they were white (p. 235).

"Mr. Nelson. Would it not be more accurate, instead of saying 'white persons,' to say 'persons of the white race?' Would not that be more exact and more comprehensive, and is not the expression 'white persons' ambiguous?

"Mr. Lodge. I think the expression 'white persons' is more explicit, because when that expression is used it becomes a pure question of color, and you lose the ethnic distinction entirely. I am not sure that the employment of the term 'white persons' might not get us into some difficulties elsewhere, but 'white race' is not a scientific definition at all. The difficulty lies in trying to accomplish what is sought to be accomplished without using names. We are trying to avoid that" (p. 235).

In the conference committee the phrase 'white persons' was deleted. From this it appears that the Japanese Government and the State Department and Congress deleted the provision with reference to persons who are not eligible to naturalization lest it should be an implied recognition that the Japanese might not be eligible, and that Congress fully understood that under existing law it was the Mongolians who were intended to be excluded, and that the Japanese claim not to be Mongolians, but white persons within the existing law.

In this connection it is worth noting that among the acts which are not repealed, altered or amended by this act are all acts relating to the immigration or exclusion of Chinese, among which acts is the Act of May 6, 1882, forbidding naturalization of Chinese.

(a) *Any other construction would be violative of the existing treaty with Japan.*

By the treaty with Japan of March 21, 1895 (29 Stat. L., p. 849), "the citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property."

This treaty is still in force, but in April, 1911, a new treaty, dealing solely with commerce and navigation, was negotiated. *Each treaty contains the favored nation clause.*

Nothing could more clearly show the distinction made between Japanese and Chinese as to naturalization than that the *only limitation* on the rights of Japanese aliens in this country under the treaty of March 21, 1895, is the stipulation that the rights given "do not in any way affect the laws, ordinances and regulations with regard to trade, *the immigration of laborers*, police and public security which are in force or which may hereafter be enacted in either of the two countries" (*Yamataya vs. Fisher*, 189 U. S. 86), while the Chinese treaty of December 8, 1894, provided that Chinese "either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all the rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.*"

(g) *The Act of May 9, 1918, amending the Uniform Naturalization Law of June 29, 1906, tends to support the view that section 2169 is only restrictive of title XXX, of which it is a part.*

The Act of May 9, 1918, does three things: it amends section 4 of the Act of June 29, 1906, by adding seven new subdivisions numbered seven to thirteen; it repeals certain acts so far as covered by these seven subdivisions; it validates all certificates of naturalization upon declarations of intention filed prior to September 27, 1906, and it incidentally rectifies an error in the original act in reference to the District of Columbia.

The first of these new subdivisions numbered "seventh" is a curiosity chiefly because of the anomalous allegiance of the Filipino and Porto Rican. It provides that the native-born Filipino of required age who has made his declaration of intention, after service of not less than three years in the Navy, Marine Corps or Naval Auxiliary Service and has an honorable discharge or discharge for re-enlistment may "on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the bureau of naturalization, in accordance with the requirements of this subdivision, it is shown that such residence cannot be established;" while "any alien, or any Porto Rican not a citizen of the United States," of the required age who has enlisted in *any* of the branches of the Army or Militia, Navy or Marine Corps or Naval Auxiliary Service, or the Coast Guard, without restriction as to length of service provided that he has re-enlisted, been reappointed, or has an honorable discharge or furlough to the Army Reserve or the Regular Army Reserve or has served three years on a vessel of the United States Government or a merchant or fishing vessel of more than twenty tons burden, may be so naturalized; while "any alien" serving in the military or naval service during the war may be naturalized without preliminary declaration or proof of residence; and any alien, who has served in the Army or Navy or *Philippine Constabulary*, been honorably discharged and entered military or naval service may be naturalized on three years' residence either in the United States, Philippine Islands or Panama Canal Zone, and petitions may be filed at the most convenient court either by an alien or a person owing permanent allegiance to the United States, who comes within the subdivision, and may be heard immediately; the alien but not the person owing allegiance may file his petition without personal appearance and without fee, but the poor Filipino, inhabitant of the Canal Zone or Porto Rican, not a citizen, apparently has to appear in person and pay his fees. This section appears to make distinctions between the Filipino in the Naval and Marine Corps and the Army, and between the

alien and the person owing allegiance to the United States, on lines which are not at all clear.

Subdivision "eight" re-enacts the Seamen Act; "ninth" provides for instruction in citizenship; "tenth" disposes of the declaration of intention in certain cases of misinformation; "eleventh" modifies the provision for the naturalization of alien enemies so that the declaration of intention must be made two years prior to the existence of the state of war and provides further security against fraud in the naturalization of alien enemies; "twelfth" for the resumption of citizenship by persons in the military service of the allies; and "thirteenth" provides for service in the military or naval forces of the United States wherever they may be, to be construed as residence in the United States.

The repealing section is obscure. Section 2166 is repealed excepting as to aliens prior to January 1, 1900, serving in the Armies and with a discharge, also section 2174, a portion of the Naval Appropriation Act of July 26, 1894, the like Act of June 30, 1914, and a portion of section 3 of the Act of June 25, 1910, are repealed; excepting for the purpose of prosecuting for offenses, and the act continues:

"That all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined."

There is no "seventh" subdivision of *this* act unless it is that entitled "thirteenth" relating to continuous residents within the United States, but if the seventh subdivision of section 4 of the Act of June 29, 1906, is referred to, there is nothing "specified" in that subdivision in reference to section 2169 and there is no "limitation therein defined" of section 2169, which is neither "repealed nor in any way enlarged" by that subdivision, or for that matter by any part of the act itself, unless the contention made in this brief is to be sustained. If the effect of taking special cases of soldiers and sailors out of title XXX and putting them into the Uniform Act of June 29, 1906, takes them out of the limitation of section 2169, then, although that section is not repealed or for that matter enlarged, it no longer has any application, and in that sense the change is specified and the limitation defined.

II.

The point that section 2169 enlarges and not restricts title XXX of the Revised Laws has never been adjudicated in any true sense, and the point that section 2169 does not restrict the Uniform Act of June 29, 1906, but is confined by its terms to title XXX, has never been adjudicated at all.

(a) *No court excepting Judge Lowell, In re Halladjian, has taken into consideration what the section plainly says.*

No judge and no court has ever analyzed this section in connection with title XXX, excepting Judge Francis C. Lowell, who said:

"Rev. St. 1873, sections 2165-2168, omitted mention of 'free white persons,' thus opening naturalization to all aliens. Notwithstanding this universal inclusion, yet the special inclusion of Africans made by the Act of 1870 was expressly, though needlessly, continued in section 2169, as follows:

"The provisions of this title (Naturalization) shall apply to aliens of African nativity and to persons of African descent."

"The intent of Congress in passing section 2169 in its original form was

to insure by express inclusion the right of Africans to be naturalized like all other persons. By Act February 18, 1875, c. 80, 18 Stat. 318, passed 'to correct errors and to supply omissions in the Revised Statutes,' section 2169 was amended to take its present form, thus again limiting naturalization to (1) free white persons, and (2) Africans within the Act of 1870. The broad phrase 'any alien' was left unchanged in sections 2165-2168, and its meaning therein was defined and cut down by section 2169. This is the most reasonable construction of section 2169 in its present form. To make the additional express inclusion of whites by the amendment of 1875 operate to exclude all other persons from naturalization is an awkward construction, but seems inevitable. By Act May 6, 1882, c. 126, sec. 14, 22 Stat. 61, the courts were forbidden to naturalize Chinese." (*In re Halladjian*, 174 Fed. 834.)

But this was not necessary to the decision, for the point decided in that case is that an Armenian is a white person.

As a matter of fact, the opinions, from that of Judge Sawyer down, are based on the debates in Congress and not on the language of the provision. In the debate in 1870 the Chinese alone were referred to, and at that time the words "being a free white person" in existing law were restrictive. The remarks of Mr. Poland in 1875 show Congress intended to give the old meaning to the clause.

Even the language of a member of the committee cannot be resorted to for the purpose of construing a statute contrary to its plain terms. (*Pennsylvania R. Co. vs. International Coal Min. Co.*, 230 U. S. 184.)

And beyond the reports of the committee, this court will not go.

"The unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out." (*Lapina vs. Williams*, *ubi supra*.)

No court other than Judge Lowell has ever considered the language of the section, has ever taken into consideration the fact that the amendment was not made to section 2165, where, if intended to be restrictive as in the earlier law, it belonged, but to 2169, which was originally and still continues to be a broadening and not a restrictive clause, but all these decisions, as we have said, are based on a pure supposition of what Congress intended to do, based on remarks of Mr. Poland and the desire of the Western coast to exclude Chinese, which California evidently did not consider was safely done until the passage of the Exclusion Act of 1882.

(b) *No court has ever passed on the point that section 2169 is confined in terms to title XXX of the Revised Laws.*

The only question which has been adjudicated is whether section 2169 is repealed, and it has been held that section 2166 is not repealed and would be governed by section 2169, the Act of 1894 being similar, it restricted that act also. (*Bessho vs. United States*, *ubi supra*.)

United States vs. Balsaro, *ubi supra*, is a little nearer in language, but in that case the order admitting a Parsee was affirmed, and what is said on the question of the implied repeal of section 2169 is *obiter dictum*. The Act of June 29, 1906, is assumed to be a part of title XXX of the Revised Statutes of the United States. The requirement that the petition should set forth all material facts is not referred to, and what is said about the statement as to color in the declaration of intention overlooks the requirement that color is shown "as a visible distinctive mark" to identify the petitioner for naturalization, and is not required to be set forth in the petition as one of the material facts.

In re Alverto, 198 Fed. 688, a doubtful decision, merely cites *United States vs. Balsaro* as authority to the point.

Summing up these cases, the Bessho case decides nothing in regard to the Act of June 29, 1906. It deals with the limitation on the excepted classes, and the Act of July 26, 1894, which is said to be similar to section 2166, which is not repealed, and, being a part of the title, would be controlled by section 2169. What is said in the Balsaro case is dictum of the hasty and ill-considered sort; and Thompson, district judge, in the Alverto case does not discuss the point, simply citing the dictum in the Balsaro case as decisive. In the Alverto case the petitioner relied on the Act of July 26, 1894, being the excepted classes, but also claimed under section 30 of the Act of June 29, 1906.

III.

Section 2169, if applicable to the Act of June 29, 1906, must be construed as meant in the Act of March 26, 1790, and, so construed, "free white persons" means one not black, not a negro, which does not exclude Japanese.
 (a) *Section 2169, if considered as a re-enactment of the earlier law, is to be construed in the light of, and with the meaning of, the original Act of March 26, 1790.*

"* * * upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365." (*McDonald vs. Horcy*, 110 U. S. 619; *In the matter of Kang-Gi-Shun-Ca.*, 109 U. S. 556; *Crenshaw vs. United States*, 134 U. S. 99.)

"The re-enacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested." (*United States vs. Le Bris*, 121 U. S. 278.)

There must be something clearly showing an intention to change the law. (*United States vs. Ryder*, 110 U. S. 729.)

The construction is with reference to the original Act.

"This rule has been repeatedly applied in the construction of the Revised Statutes." (*Hamilton vs. Rathbone*, 175 U. S. 414.)

"The meaning of free white persons is to be such as would naturally have been given to it when used in the first Naturalization Act of 1790." (*Ex parte Shahid*, 205 Fed. 812.)

(b) *So construed, the words "free white persons" in the Act of March 26, 1790, mean free whites as distinct from blacks, whether slave or free.*

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counterdistinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race, and the Constitution, article I, section 9, provided that "The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight," which provision was universally understood to be aimed at the abolition of the slave trade after that date. It was certainly not used in a scientific or technical sense.

Blumenbach's race classification, which has been cited by many as a basis for construing this act, was published in Germany during the American Revolution in 1781. It was first translated into English in London in 1807 by Eliotson. (*In re Dow*, 213 Fed. 355, 365; *Dow vs. United States*, 226 Fed. 145.)

It was only a few years before this, 1783, that Harvard had permitted those not preparing for the ministry to take French instead of Hebrew, and Charles Follen became the first instructor in German in any college at

Harvard in 1825, and it is well known that it was not until much later than 1790 that there was any Germanic influence in American education. In fact, it was an almost unheard-of thing that Bancroft, after his graduation in 1817, should go to Germany for further study. No college or university taught anthropology until after the middle of the nineteenth century. The first systematic instruction was at Harvard in 1888 and at Clark University in 1889. The various instrumentalities for anthropological research have grown up since 1875. (*Americana*, vol. 1, *Anthropology*.)

None of the Senators or Congressmen had any education which brought them into contact with Blumenbach's classification when this naturalization law was passed in 1790. In the course of a debate on the law in 1790 Madison, who was then in Congress, said:

"They would induce the worthy of mankind to come, the object being to increase the wealth and strength of this country. Those who weaken it are not wanted." (*Legislative History of Naturalization by Franklin*, p. 40.)

In the same debate, Page of Virginia held that the European policy does not apply here, and that a more liberal system was permissible. It was inconsistent with the claim of Asylum to make hard terms. These would exclude the good and not the bad. He would welcome all kinds of immigrants; all would be good citizens. Lawrence of New York declared that they were seeking to encourage immigration. All comers, rich or poor, would add to the wealth and strength of the country. Those speaking on the other side urged the apprehension from introducing paupers or criminals, or those lacking in character, in knowledge of or attachment to free institutions, for instance, Roger Sherman, who thought the intention of the constitutional provision was to prevent states from forcing undesirable persons on other states, and that Congress would not compel the reception of immigrants likely to be chargeable to a state. (*Idem*, p. 38.)

President Jefferson, in his first message to Congress, December, 1801, said, in recommending the repeal of the Alien Act of 1798, and the revision of laws on the subject of naturalization:

"Shall we refuse to the unhappy fugitives from distress that hospitality which the savage of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?" (*Idem*, p. 97.)

Judge Lowell, in the most exhaustive discussion that has been had upon the meaning of this section, after showing that race "is not an easy working test of 'white' color as required by section 2169," continues:

"Section 2169, however, makes no mention of race or of racial discrimination. 'White persons' are to be naturalized and (except Africans) no others. If we pass from racial speculation and remote history to the usage of the colonies and of the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattos, Indians, and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes, and Indians; that of 1774 as whites, blacks, and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes, and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as

white and black; that of 1786 as whites, slaves, and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790. 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic.' Page 80. Here, again, 'white' is made to include all persons not otherwise specified.

"The Census Act of 1790 (Act March 1, 1790, c. 2, 1 Stat. 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by 'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the Government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored, and slaves,' and the class 'free colored' was subdivided between blacks and mulattos. Rev. St., sec. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 219, sec. 9, 25 Stat. 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' (Eleventh Census, part I, p. XCIV.) In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, sec. 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese, and Japanese. In other instances 'colored' as opposed to 'white' was used to include negroes, Chinese, Japanese, and Indians. Throughout the chapter cited in the above-mentioned Bulletin it is assumed that all persons not classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes requiring separate accommodation in travel. A statute of Arkansas required separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p. 17, c. 17, sec. 4. See, also, Laws Fla. 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, subc. 4 (Code 1904, sec. 1294d); Civ. Code S. C. 1902, sec. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, sec. 1231; Ky. St. 1909 (Russell's), secs. 5607, 5608, 5642, 5765 (Ky. St. 1909, secs. 4523, 4524, 4428, 4487). The recent constitution of Oklahoma (art. 23, sec. 11) reads as follows:

"Whenever in this constitution and laws of this state the words "colored" or "colored person," "negro," or "negro race" are used, the same shall be construed to mean to apply to all persons of African descent. The term "white race" shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the Government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the Act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindus, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classified as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified." (*In re Halladjian, ubi supra.*)

(c) "White person," as construed by the Supreme Court of the United States and by the state courts, means a person without negro blood.

This was so held by the Supreme Court of the United States in construing section 2154 of the Revised Statutes, and it was held "that Congress meant just what the language used conveys to the popular mind." (*United States vs. Perryman*, 100 U. S. 235.)

Namely, a person not a negro.

We shall give, in connection with citations from the dictionaries, a reference to the numerous states which have used the expression "white person" to distinguish a person who has no negro, or only a part negro, blood in his veins since the abolition of slavery. The earlier statutes in the states are reviewed by Chief Justice Taney in *Dred Scott vs. Sandford*, and he shows, by an examination of these, the provision in the Articles of Confederation using the term "free inhabitants," to describe those who were "entitled to all the privileges and immunities of free citizens, in the several states," and the Naturalization Act of March 26, 1790, that the expression "free white person" was used to exclude members of the inferior and degraded negro race, whether free or slaves. In discussing the first Militia Law, passed in 1792, he says:

"The language of this law is equally plain and significant with the one just mentioned. It directs that every 'free able-bodied white male citizen' shall be enrolled in the militia. The word 'white' is evidently used to exclude the African race, and the word 'citizen' to exclude unnaturalized foreigners, the latter forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether

they were slave or free; but it is repudiated and rejected from the duties and obligations of citizenship in marked language." (*Dred Scott vs. Sandford*, 19 How. 393, 420.)

"White," as used in the legislation of the slave period, meant persons without a mixture of colored blood, whatever the complexion might be. (*Du Val vs. Johnson*, 39 Ark. 182, 192.)

(d) *The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro.*

White is defined in the Standard Dictionary as—

"1. * * * opposed to *black*. * * *

"2. Having a light complexion. (1) Of the color of the Eurafrican or Caucasian race; opposed especially to *negro*, but often to the yellow, brown, or red races of men."

The Century defines white as—

"1. * * * The opposite of *black* or *dark*. * * *

"6. Square; honorable; reliable, as, a *white* man. (Slang, U. S.)"

Webster defines it as "1. The opposite of *black* or *dark* * * *" and defines a white person as "a person of the Caucasian race (6 Fed. 256). In the times of slavery in the United States, *white person* is construed in effect as a person without admixture of colored blood."

"White person" is defined in the new Standard Dictionary as—

"1. Any person of the Eurafrican race.

"2. (U. S.) Any person without admixture of negro or Indian blood. Since 1865 various legal constructions of this term have been made in different states, as in Arkansas, where a white person is one having no negro blood, or in Ohio, where one is a white person who has just less than half negro blood in his veins."

Webster's New International Dictionary:

"In various statutes and decisions in different states since 1865 *white person* is construed in effect as a person not having any negro blood (Arkansas and Oklahoma). A white person is one having less than one-eighth of negro blood (Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Minnesota, Montana, Tennessee, Texas, Maine, North Carolina and South Carolina). A white person is one having less than one-fourth of negro blood (Michigan, Nebraska, Oregon and Virginia). A white person is one having less than one-half of negro blood (Ohio)."

(e) *The insertion by Congress of the word "free" in section 2169 in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to re-enact the old section with the old meaning.*

In 1790, as we have shown, "free" was inserted in the phrase "free white persons" to distinguish the class of aliens who could be naturalized from all negroes, whether slave or free. Again, at that time slavery existed in this country, and Congress had no power to forbid the slave trade, whether white or black. In 1875 there had been a complete change, not only in this country, but in the world. Slavery had been abolished in 1865 by the Thirteenth Amendment, and, as Dr. Francis Wharton used to say, before the Civil War freedom was sectional and slavery universal, whereas, after the war, freedom is universal and slavery sectional. If the word "free" refers to the condition of aliens in the United States, all aliens are free; if it refers to their condition in the country to which they owe allegiance, being domiciled in the United States, the land of the free, they have become free by the mere fact of coming into a free country.

IV.

Giving the words "free white persons" their common and popular acceptance in 1875, no "uniform rule" can be laid down, based on color, race or locality of origin, and there is nothing in the laws of the United States, its treaties, in the history of the time, or the proceedings of Congress, to show that Japanese were intended to be excluded.

(a) Up to 1875 there had been no Japanese immigration, no suggestion of their exclusion, and America had recently opened Japan to the western civilization, which Japan was gladly welcoming.

Up to 1875 few Japanese immigrants had entered America. In the decade of 1861-70 the immigration reports show that two hundred and eighteen arrived; in the next decade the number fell off. Exclusive of students, probably there were not fifty Japanese in the whole country. The Asiatic immigration was Chinese, largely imported to build the Pacific railroads, of an entirely different character from the present Japanese immigration, of single men who did not come to establish homes; the women imported as slaves for immoral purposes. It was a race which came chiefly as contract laborers, expecting to return; and these immigrants are termed indifferently in the debates and decision Mongolians and Chinese.

(b) Judicial construction of the phrase up to 1875 does not sustain such an exclusion.

We have already cited the Dred Scott and Arkansas cases. There is little of judicial construction to be found. The act was before the courts in New York and construed in an ably argued case, in which the vice-chancellor, referring to President Madison's declaration in the debates in the Federal Convention in 1787 that America was indebted to emigration for its settlement and prosperity, showed that the policy was to encourage emigration, and "to bestow the right of citizenship freely, and with liberality unknown to the Old World." (*Lynch vs. Clarke*, 1 Sandf. 583, 649, 661.)

Amongst the state acts discussed are two in which it appears that Virginia amended a statute of May, 1779, chap. 55, which limited citizenship to *free white persons*, in 1792, to include "*all free persons*" (pp. 666, 667).

A decision by a divided California court, that the words in the 14th section of the California Act of April 16, 1850, providing that "No black or mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man," included a Chinaman, holding that the term "Indian, from the time of Columbus to the present time, had been used to designate 'the whole of the Mongolian race,'" "that 'white' and 'negro' are generic terms, and refer to two of the great types of mankind"; "and that, even admitting the Indian of this continent is not of the Mongolian type, that the words 'black person,' in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian." (*People vs. Hall*, 4 Cal. 399, 404.)

This decision does not seem to have been treated with much respect as a matter of reasoning; the legislature speedily amended the law, and the same court held that while *People vs. Hall* must be followed, "we cannot presume that all persons having tawny skins and dark complexions are within the principle of that decision," and allowed a Turk to testify on the ground that the Caucasian type predominated and constituted the controlling element. (*People vs. Elyea*, 14 Cal. 145.)

All that Chancellor Kent says is that he "presumes" that the phrase excludes the inhabitants of Africa and their descendants, and then he sug-

gests that it *may* become a question to what *extent* persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify, and—

"Perhaps there *might* be difficulties also as to the copper-colored natives of America or the yellow or tawny races of the Asiatics, and it may well be *doubted* whether any of them are 'white persons' within the purview of the law." (2 Kent's Comm., p. 72.)

(c) No "uniform rule," applicable in all cases, can be drawn from the decisions since 1875.

It has been held by this court that a Chinese person cannot become a naturalized citizen under the laws of the United States of May 6, 1882. (*Low Wah Suey vs. Backus*, 225 U. S. 460.)

A more accurate statement than the earlier one by Chief Justice Fuller, commented upon by Judge Lowell, "That a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress." (*In re Ah Yup*, *ubi supra*.)

That "a person of Mongolian nativity" was a native of China and cannot become a citizen (*In re Hong Yen Chang*, 84 Cal. 163); that a Burmese, being a Malay, "who under modern ethnological subdivisions are Mongolians, is not eligible (sic.)" (*In re San C. Po*, 28 N. Y. Supp. 383); that it "include members of the white or Caucasian race as distinct from the black, red, yellow and brown races" (*In re Alverto*, *ubi supra*); "The Caucasian race only" (*In re Akhay Kumar Mozumdar*, 237 Fed. 115).

"Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them?" (*In re Dow*, 213 Fed. 355.)

"It would not mean Caucasian." (*Ex parte Shahid*, *ubi supra*.)

It would include persons on the European side of the Mediterranean, although racially descended from many sources, the generally received opinion being that they were white persons. (*Dow vs. United States*, 226 Fed. 145.)

It would include a Parsee. (*United States vs. Balsara*, *ubi supra*.)

It would not include a half white and half Indian, because not of Caucasian race. (*In re Camille*, *ubi supra*.)

Speaking of the section, Judge Lowell, from whom we have already quoted, sums up the whole matter:

"That section implies a classification of some sort. What may be called, for want of a better name, the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied upon section 2169 without making distinctions which Congress certainly did not intend to draw, e. g., a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large

country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in section 2169." (*In re Mudarri*, 176 Fed. 465.)

In cases dealing with Japanese, Judge Colt held, *In re Saito*, 62 Fed. 126, that the Japanese were excluded because Congress refused to extend naturalization to the Mongolian race, and classes Chinese and Japanese on the same footing.

Judge Hanford holds that Japanese are excluded because of "the intention of Congress to maintain a line of demarcation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country." (*In re Buntaro Kumagai*, 163 Fed. 922.)

He does not say what race the Japanese belong to, nor what race is predominant.

In the *Bessho* case Judge Goff would seem to exclude Japanese because "all alien races except the Caucasian are excluded," and Judge Chatfield because "A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized." (*In re Knight*, 171 Fed. 299.)

The Washington court would seem to exclude them because the naturalization law applied merely to the Caucasian race, and that it had been held *In re Saito* that a native of Japan was of the Mongolian race (*In re Yamashita*, 30 Wash. 234, 70 Pac. 482); the Utah court held that a Hawaiian, not being of the Caucasian or white race, or of the African race, was excluded. The court seemed to include the Hawaiians as *Mongolians*! (*In re Kanaka Nian*, 6 Utah 259, 21 Pac. 993); Judge Maxey admitted a copper-colored Mexican, who apparently was an Indian of unmixed blood, holding that Judge Sawyer's decision might well be limited to members of the Mongolian race, and while the applicant would not be, by any strict scientific classification, classed as white, he fell within the liberal intent of the statute, as shown by the course of the United States Government in annexation and treaty, citing *Lynch vs. Clarke*, *ubi supra*, as to the liberal policy (*In re Rodriguez*, 81 Fed. 337). Judge Maxey cites the acts establishing territorial government for New Mexico and Utah, each of which use the expression "free white" to describe those entitled to vote, but which in the same section clearly recognize, as included in that definition, Mexicans who are not white or of the Caucasian race (p. 352).

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolian. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in state and federal courts.

In fact, the census of 1910 shows 209 American-born citizens, 420 naturalized, and 389 with first papers, who are Japanese. (American Democracy and Asiatic Citizenship [Gulick], p. 185.)

(d) *Such exclusion is inconsistent with friendship of America with Japan.*

It is unnecessary to say anything upon the warm friendship of Japan toward America and America toward Japan from the time the hermit nation was opened up by Commodore Perry. Japan looked upon America as her friend and type until she was rudely awakened by the attitude of the United States Government during the Russo-Japanese war and events in California.

The World War has contributed, however, to restore the relationship which existed unimpaired for half a century.

The feeling of the United States before the passage of the Act of 1906 is shown in the annual message of President Cleveland of 1894, who says (Message and Papers of the President, vol. 9, p. 529):

"Relations with this progressive nation should not be less broad and liberal than with other powers."

The announcement of what was really the admission of Japan to the family of nations by the treaties of 1899 in President McKinley's message of December 5, 1899, and the special message of President Roosevelt, December 18, 1905, confirm this.

The feeling of the Japanese towards America is nowhere better expressed than in the preface and the first chapter of Kawakami's remarkable book on "Japan in World Politics."

V.

The words "free white persons," neither in their common and popular meaning, nor in their scientific definition, define a race or races or prescribe a nativity or locus of origin. They deal with personalities and the qualities of personalities, and are only susceptible of meaning those persons fit for citizenship and of the kind admitted to citizenship by the policy of the United States.

(a) The words deal with individuals, not with races, nor with natives of any country or of any particular descent.

(b) The word "free" is an essential part of the clause. Under the old English law it means a freeholder as distinguished from a serf. Under the Constitution it is used in opposition to slave. It is a condition which the Declaration of Independence asserts all men are born to. It imports a free-man, a superior, as against an inferior class.

(c) "White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

(d) "Person" is "a living human being; a man, woman or child; an individual of the human race." (*U. S. vs. Crook*, 25 Fed. Cas. 695.) The provisions of the Fourteenth Amendment in reference to persons "are universal in the application to all persons within the territorial jurisdiction without regard to any difference of race or color or nationality." (*Y. Wo vs. Hopkins*, 118 U. S. 369.) The same rule has been applied to include aliens under the Fifth and Sixth Amendments. (*Wong Wing vs. U. S.*, 163 U. S. 235.)

(e) No case has considered this point or given emphasis in the construction of the section to the words "free" and "persons," which are as important to the construction as the word "white." Nearly all think the section deals with *races*.

VI.

The question certified is whether all Japanese as a people are excluded from naturalization which would exclude a "person" who is "free," who is "white," because he is a Japanese.

The question certified does not deal with individuals, but with a people, and the affirmative answer would exclude a Japanese who is "white" in color and is of the Caucasian type and race. No argument can accentuate this point more strongly than the mere statement of it.

VII.

The Japanese are "free." They are, or at least the dominant strains are, "white persons," speaking an Aryan tongue and having Caucasian root stocks; a superior class, fit for citizenship.

"Of one blood hath He made all nations," says Paul; and from the time of Aristotle, science, as well as religion, has taught a common origin of mankind, and many of the great races today unite in common blood variations from one cause or another and centering in that common blood. Even Blumenbach, who is the father of modern anthropology, says that "Innumerable varieties of mankind run into one another by insensible degrees."

He invented the division into Caucasian, Mongolian, Ethiopian, American and Malay, of which the Britannica says, referring to the term Caucasian: "The ill-chosen name of Caucasian, invented by Blumenbach * * * and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races." (2 Enc. Brit., p. 113.)

On the other hand, Cuvier divides the races into Caucasian, Mongol and negro, corresponding to white, yellow and black, but this is clearly not sufficient.

Huxley distinguishes four principal types of mankind, the Australoid, Negroid, Mongoloid and Xanthochroic ("fair whites"), adding a fifth variety, the Melanochroic ("dark whites"). (2 Enc. Brit., p. 113.)

But that work adds, page 114: "The doctrine of the unity of mankind stands on a firmer base than in previous ages."

And volume 9, Enc. Brit., p. 851, includes in the Caucasian race certain of the brown Polynesian races, including Hawaiians and the Ainus.

In "Man Past and Present" Professor A. H. Keane, F.R.G.S., in the "Cambridge Geographical Series," describes mankind under four leading types, which may be called black, yellow, red and white, or Ethiopic, Mongolic, American and Caucasic. He distinguishes Mongolians into three kinds: Northern, Southern and Oceanic, extending from Finland to the Philippines, and reckons the Japanese among the Northern Mongolians, whose color is thus described:

"Light or dirty yellowish amongst all true Mongols and Siberians; very variable (white, sallow, swarthy) in the transitional groups (Finns, Lapps, Magyars, Bulgars, Western Turks, and many Manchus and Koreans); *in Japan the uncovered parts of the body also white*" (p. 266).

The Encyclopaedia Britannica, vol. 11, p. 635, commenting upon Professor Keane, says:

"The contrast between the yellow and the white types has been softened by the remarkable development of the Japanese following the assimilation of Western methods."

The decisive test which modern science has applied is cranial measurements, and it is this test which has excluded the Japanese from the Mongolian division, although Dr. Munro, hereafter quoted, referring to the fact that "Every human being is a mixture of root stocks," in a letter says:

"It cannot be said that the Japanese are a Mongolian race, but Mendel's rule holds good and one may see pure Mongolian forms sometimes. I have seen a pure Mongolian type in the child of an American missionary (except the complexion and color of the eyes), and this type is fairly common in east-central Europe.

"The preservation of a conventional racial type is a matter of aesthetics.

What really counts in humanity is home influence and education, and where the ideals are high the racial type is of little moment. But as the prejudice exists and as each nation has the right to choose its physique, the best plan, as it seems to me, would be for the Japanese authorities to make some selection, from the anthropological point of view, of those going to the States. With regard to the present case, I shall be glad to help if I can, and would be glad to make an examination. The head form and facial indices would suffice."

It is common observation that the women of the Kyoto region in Japan, particularly the higher class, are white, not darker than many of the women of this country. The Ainu, an admitted Caucasian, is the darker. The influence of climate and habit has much to do with the matter of complexion. Ellis, in his *Polynesian Researches*, speaking of color, says that Polynesian infants are born little darker than European children.

Hawks' Narrative of Commodore Perry's Expedition to Japan, published by order of Congress in 1856, is the first authoritative and perhaps the only governmental expression on the origin of the Japanese. He says:

"Kaempfer brings them from the plains of Shinar, at the dispersion. He supposes them to have passed from Mesopotamia to the shores of the Caspian, thence through the valleys of the Yenishi, Silinga and parallel rivers to the lake of Arguen; then following the river of that name which arises from the lake, he thinks they reached the Amoor, following the valley of which they would find themselves in the then uninhabited peninsula of Corea, on the eastern shores of Asia. The passage thence to Japan, especially in the summer season, would not be difficult. He supposes that this migration occupied a long time. * * * This, if not satisfying, is at least ingenious. * * * Dr. Pickering, of the United States exploring expedition, seems disposed, from an observation of some Japanese whom he encountered at the Hawaiian Islands, to assign to them a Malay origin."

And speaking of their alleged Tartar origin, continues:

"But they certainly do not have the Tartar complexion or physiognomy. The common people, according to Thunberg, are of a yellowish color all over, sometimes bordering on brown and sometimes on white."

He also quotes the latter authorities as saying:

"That ladies of distinction, who seldom go out into the open air without being covered, are perfectly white. Siebold also, speaking of the inhabitants of Kiusiu, informs us that 'the women who protect themselves from the influence of the atmosphere have generally a fine and white skin, and the cheeks of the young girls display a blooming carnation.'"

"In general the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which whites assume as their own privilege." (Ratzel's *History of Mankind*, vol. 3, p. 454.)

Ratzel, after referring to the fact that the lower classes are darker, says:

"Japanese, however, sees the ideal of his breed in fair skin, dark sleek hair and slender figure."

He quotes a story from Broca to show the similarity in appearance between the Brazilian and the Japanese.

Woodruff, in his "Effect of Tropical Life on the White Race," is struck by the fact that Japan is a counterpart of Great Britain, and Dr. Brown, from whom we will quote, has emphasized this in enforcing his view that the dominant races of man are maritime, and that to make a great maritime people requires a high proportion of broken coast line to the area of the country, and preferably islands running north and south with a variety of climate.

Other authorities have sought to account for the mental alertness of the Japanese, a quality of mind in which they differ from other Asiatics and resemble the Europeans and the inhabitants of North America above the Mexican line. The Japanese are commonly called "The Yankees of the Orient," and they show no marks of the degeneracy common in the mixture of non-assimilable races. Doctor Baelz of the Imperial University of Tokyo is quoted by Kawakami in "Japan in World Politics," p. 112, upon this point, which has been with him a subject of research.

The history of the people who inhabit the islands of the Pacific has not yet been written, and even the standard authorities fail us as to their origin and affinities. The most reliable authority on Polynesia is Dr. J. Macmillan Brown, vice chancellor of the University of New Zealand, and on Japan, Dr. N. Gordon Munro, and a better understanding of these peoples can be had from their recent work than from any other source.

Some conclusions are now fairly well demonstrated: that the Polynesians are a Caucasian race speaking an Aryan tongue, springing from the earlier Mediterranean race and allied to the later Baltic peoples of Europe; that a great nation once inhabited a continent now submerged in northwestern Polynesia, of which the capital was Ponape, in the Carolines—the stone remains showing an ancient city of 100,000 inhabitants, perhaps the fabled Hawaiki of the Polynesians; that the root stocks of the Japanese are the Ainu in the north and the Yamato in the south, each Caucasian, the latter of the Mediterranean stock; that there was probably a palaeolithic as well as a megalithic invasion of Polynesia from Japan; that affinity is shown by the linguistic attitude of the Polynesian people which faces towards Japan; in the patriarchate or headship of the father as against the matriarchate; in its vocabulary and phrenology; again, from the location of the Polynesian spirit land or Hawaiki, for as the soldiers today at the Western front speak of the dead as "going West," so the souls of the departed Polynesians were said to have "gone West"; and finally by the maritime character of these people, for the Mongolian is primarily a landlubber, while the Japanese and the Polynesian are daring lovers of the seas.

Dr. Brown, in a paper delivered before the Hawaiian Historical Society, September 5, 1918, says that:

"The phonology of the Polynesian dialects differs by the whole world from that of all the languages to the west of it * * *. There are only two languages in the Pacific Ocean which have the same phonological laws, the Japanese to the northwest and the Quichua to the southeast * * *. The range of sounds in Japanese is nearly the same as in Polynesian.

"In fact, as Fornader points out, the primitive Aryan language must have had exactly the same range of consonants as Polynesian, and though the process was not carried so widely among the vowels, the decadence and interchange of consonants had begun. The homeland of the primeval Aryan is now accepted as in Europe between the Baltic and the Black Sea, and that was a cold region in which the organs of speech were capable of difficult consonantal sounds; whilst the environment of Polynesian after it reached the Pacific was tropical and exactly suited to the decay of the consonants."

And again:

"The primeval Aryan languages must have traveled from Europe west of the line between the Baltic and Black Sea through Asia, long before Sanskrit began its long migration into India or even began its elaborate inflectional system.

The linguistic attitude of Polynesia faces north towards Japanese and

Ainu, which have got so much restriction on their use of nouns and numerals. That the Polynesian vocabulary looks also to some extent in that direction will be apparent from a few examples."

In his "Maori and Polynesian" Dr. Brown, in addition to proving that the Polynesians spoke an Aryan tongue and were of the Caucasian race, springing originally from the north of Africa, on the shores of the Mediterranean, thence migrating to the Baltic, and through southern Siberia, Lake Baikal, Korea and Japan, the megalithic track continued into Polynesia by a course involving much less sea than in the present age, when a large portion of Polynesian continent has subsided (pp. 3-5, 26, 27, 38, 59, 118, 252, and 253), points out the resemblance to the Japanese in maritime skill and love of the sea (p. 7), which is essentially Caucasian and not a trait of the negroes or negroids, Mongols or Mongoloids, that the route through Japan and Polynesia is the dolmen route, that the Japanese and Polynesians show affinities in art, in sports and in other habits of life (pp. 49, 50, 201, and 265), and that Polynesia affiliates with Japan in the patriarchate or father-headship as against the matriarchate or mother-right (pp. 38 and 250).

Dr. Munro, with Dr. Baelz's work as a basis, and much new material on which to base his conclusions, including the work of Gowland, Tsuboi, Baron Kanda, Aston, Torii, Takahashi and Wada, in a paper before the Asiatic Society of Japan, at Keio University, March 21, 1917, dealing with the two root people, the Ainu and the Yamato, particularly with the Yamato, says:

In respect to the personal investigation I have some justification in the knowledge that the demonstration of Ainu culture in the shellmounds of Honshu and Kyushu and of Yamato remains in shellmounds and stone age sites of the South is pioneer work, far from complete, but establishing the Ainu as aborigines and the Yamato root-folk as having also a birthright, if not as the prior autochthones of Japan * * *

He then goes on to say:

"* * * at the risk of again overcrowding material I shall first show some representative pictures of material preserved in and by association with the sepulchres of the Yamato and shall follow this with illustrations of these sepulchres themselves. I shall then present some evidence of similar sepulchres and of megalithic monuments in Europe with a rough sketch map showing their prevalence in the Mediterranean area and through the Eurasiatic continent. * * *

Finding the immediate source of this culture in—

"Korea, the proximate habitat of the Yamato invasion and immigration. From thence in all probability, came the virile forces of the iron wielding 'horseback domination' which ultimately united with the agricultural pre-Yamato folk of Kyushu and possibly around the Inland Sea."

Where he thinks these people may have lived for a considerable time before invading Japan.

After referring to prototypes in Europe, in Egypt, in Greece and around the Mediterranean generally, he says:

"We must however, leave such parallels in culture and I can steal only one minute from our remaining time to point out the course of the ancient Japanese concept the *Mitsudomoe*, which is here shown and which from these examples may be traced into China and thence into Babylonian culture and that of the Mediterranean prehistoric civilization, where it is found on the spindle weights of Troy. It was also familiar as the anthropomor-

phic concept in the sun in almost every land (Egypt perhaps excepted) conventionalized from the biped concept as a sign of mankind."

And after describing the sepulchres themselves, and discussing whether there was any contact with China, he concludes:

"But it is not necessary to suppose that this 'Horse-back domination' ever came into close contract with the Chinese before settling in Korea.

"Where then did the dolmen originate? That is likewise uncertain. But we know where dolmens existed at a date long anterior to those in Japan. That was in North Africa and in Europe, where dolmens contain relics of the later stone age and the early metal phases of copper and bronze, but rarely the least trace of iron. In Japan, on the other hand, the dolmens are of the iron age, with vestiges of the bronze period and mere traces of a stone age in conventional offerings.

And says there is something maritime in the character of the people of allied culture, and tracing this course he continues:

"This culture did not spread into Egypt, though there are two patches on the Nile, but it is found in Syria and Palestine around the Black Sea and between it and the Caspian, in the Caucasus and southern Russia, whence it spread into Siberia in a mitigated form. It also entered Arabia, Madagascar and Persia, while in southern and central southern India it was established on an immense scale. Whether it reached India by sea or land is not yet certain, but traces at least are known in northern India and it has been followed into Burmah."

After which he still further concludes that it is maritime, referring incidentally to the remains before referred to on the Island of Ponape, described by Christian in his book on the Carolines, and says:

"* * * if we note the similarity of special designs and contrivances between East and West in prehistoric times, we have, I think, good ground for the belief that the dolmen culture of Japan was rooted in the Mediterranean area. It is a far cry from Japan to this area or to the region of the five seas, and it may be premature yet to insist on any limited area for the provenance of the Caucasian element in the Japanese people.

"Whether there was any connection between the Yamato root-folk in Kyushu and the infiltration of European stock into the Pacific which resulted in the so-called Polynesian race, is another problem which is not yet ripe for solution. Any such connection must have been at a very remote age. * * *"

And in conclusion says:

"My opinion is that the Yamato root-folk of Kyushu and the present Polynesian people diverged from an Indonesian or other stock of European affinities in the very early stage of the neolithic or polished stone age, possibly in later palaeolithic times.

"The Korean contribution to the Yamato probably came not only from the southern coast of Asia and the islands near to it, but also through Manchuria, possibly migrating in part from the Caspian Sea, and keeping north of the fortieth parallel. Otherwise it seems to me that this migration through Asia must have occurred before the Chinese civilization had concentrated south of that latitude. I do not doubt that some Mongolian element had penetrated the islands to the south of Japan in ancient times; indeed, I have evidence of it. But I think this element was inconsiderable and that we must look to the soldiery and the agricultural serfs in the Korean immigration for the Mongolian component persisting in Japan. That this ingredient is present admits of no question, but that is a very different thing from the assertion that the Japanese are a Mongolian race.

I affirm that the Japanese are not predominantly Mongolian. Physical anthropology teaches us that the Japanese, as we ourselves, are a mixture, a conglomeration of characters of primitive as well as of advanced mankind. If I have been at all successful in demonstrating this in my first lecture; if we have come to the conclusion that the Ainu are, if themselves mixed with other characters, an early European stock, that they have mingled to some extent with the Yamato stock, considerably in the south and noticeably in the north; if the considerations which I have just brought forward with regard to the European provenance of Yamato culture have any validity in conjunction with the decided evidence of European traits in the physique of the modern Japanese, we cannot resist the conclusion that the word Mongolian is not a fit designation for the people of this land."

Little need be added to the tributes in the Senate of the United States, which we have quoted from the debate on the Immigration Act of 1917, but a summary of the history of the Japanese people during the last five or six hundred years, by George Kennan, the distinguished traveler, which we take from *The Outlook* of June 27, 1914, is in point:

"At the beginning of the seventeenth century the Japanese were the most daring and adventurous navigators in all the Far East. Their insular position made them hardy and expert sailors, and they had at sea a natural intrepidity which was almost equal to that of the Northmen. At the very dawn of authentic history their ships were cruising along the coasts of China and Korea, and as early as the sixth century an armed Japanese flotilla sailed northward to what is now Siberia and ascended the Amur River for the purpose of invading Manchuria. * * *

"Toward the close of the fifteenth century Japanese merchants began to extend their foreign trade to countries not previously visited, and as early as 1541 they had established commercial relations with more than twenty overseas markets and were sending their ships to regions as remote as Java, the Malay Peninsula, Siam, and the western coast of India. In 1594, twenty-six years before our Pilgrim Fathers landed on the coast of Massachusetts, the Japanese had a regular line of merchant ships running to Luzon, Amoy, Macao, Annam, Tonquin, Cambodia, Malacca and India, and making, without any great difficulty or danger, out-and-return voyages of from three thousand to twelve thousand miles. * * * They were quite capable of crossing the Pacific, and, as a matter of fact, two of them did go to Acapulco and back in 1610 and 1613. The sailors who manned these vessels were not as experienced as were the Spanish and Portuguese navigators of the same period, but what they lacked in experience they made up in enterprise, daring and resourcefulness. * * *

"All the Japanese of that time were imbued with an ardent spirit of daring and adventure, and long before the *Mayflower* sailed from Plymouth they had settlements, or colonies, in countries that are farther away from Japan than Massachusetts is from England. They took possession of the Luchu Islands, overran Formosa, helped the Spanish governor of the Philippines to put down a revolt of the Chinese in Luzon, gained a strong foothold in Siam, and, fighting there in defense of the king, defeated invading forces of both Spaniards and Portuguese. Everywhere they were regarded as dangerous enemies, and in the library of Manila there is still in existence a copy of a letter written by a Spanish friar to his home government in 1592, warning the authorities of Spain that the Japanese were 'a very formidable people,' and that their great Shogun, Toyotomi Hideyoshi, was likely to invade the Philippines as soon as he had finished the conquest of Korea. * * *

"There is a widespread popular belief that in the Middle Ages, and, indeed, long after the Middle Ages, the Japanese were an uncivilized if not a barbarous people; but this belief is based wholly on ignorance or misapprehension of their history and institutions. * * * As early as the seventh century the Japanese had schools, and before the beginning of the eighth they had established in Nara and Kyoto imperial universities with affiliated colleges and courses of instruction in ethics, law, history and mathematics. The oldest university in Europe, that of Salerno, in Italy, was not founded until one hundred years later. The Japanese opened a great public library at Kanazawa in 1270, and established their first astronomical observatory more than a century before Commodore Perry entered Uraga Bay.

"Even in the field of material achievement the mediaeval Japanese were pre-eminent. They would have regarded our invasion of Cuba with a force of 16,000 men as a very trivial affair. In 1592 their great leader, Hideyoshi, transported 200,000 men across the Tsushima Strait to Korea, and his first army corps, under General Konishi, marched 267 miles in nineteen days, fighting one pitched battle, storming two fortresses, and carrying two strongly-intrenched positions by assault. General Shafter was never more than eighteen miles from his sea base, while General Konishi, with Hideyoshi's first army corps, went 400 miles from his base at Fusan, and maintained intact through a hostile territory a line of communications. * * *"

In connection with the voyages to South America more than three hundred years ago, alluded to by Doctor Griffis—and there are some indications that there was a line running to South America at that time—it is worth noting that the only line now running from the Orient to South America is Japanese, a fact commented on by Bingham in "The Monroe Doctrine," pp. 90-95, and in this connection Kawakami gives the Japanese in South America in 1910 as 21,878, of whom 15,462 are in Brazil and 5428 in Peru.

VIII.

The Japanese are assimilable.

The debates in Congress and the literary controversies embodied in many books and articles on the Japanese question reduce the objection to Japanese naturalization to the claim that they are "non-assimilable." (Senator Phelan, p. 284; Senator Works, p. 228.) This means that it is impossible for them and undesirable for us to have them adapt themselves to Western ideas. This is a reversal of our traditional national policy, for it was President Fillmore who sent Commodore Perry to overturn the Japanese policy, which sought to prevent assimilation, and open up Japan to Western civilization. The first article of the Perry treaty of 1854 declares:

"There shall be a perfect, permanent and universal peace and a sincere and cordial amity between the United States of America on the one part and the Empire of Japan on the other, and between their people respectively, without exception of *persons* and *places*."

Having given Japan the bread of Western civilization, shall the Japanese be forbidden to eat it? In view of the last sixty years the charge is ridiculous. In what respect are they non-assimilable? Do they not have high ideals of honor, of duty, of patriotism, of family life, of religion and of social duty, and do they not adhere to these better than we do? The dignity of manhood is held up by the Declaration of Independence as the highest ideal of Americanism. How about our treatment of the black man in the South, or the Oriental in the West? In art and literature the criticism of the Japanese today is of the abandonment of their ideas and too easy adaptation to Western methods. In religion, Buddhism and Shintoism

have been infused from some source so strongly with Christian ideals that their followers do not see the contrasting splendor of the Christian faith as strongly as awakened Korea does. Of course, they have a race prejudice, but nothing compared with that of the Jew, whom we gladly welcome and protect even in foreign lands, who sits in the halls of Congress, in our highest courts, amongst our executives, in the marts of trade. Naturally, a Japanese prefers to marry a Japanese, not only on account of race prejudice, but for other obvious reasons; but they do intermarry with whites, and the almost uniform testimony is that they have happy families and vigorous progeny, pre-eminently American. Section 2169 authorizes the naturalization of black men, but half the states forbid marriage between whites and blacks.

We would hardly require the Japanese to assimilate our manners, for their manners, particularly of the women, are far superior to our own. If, as seems true, the only argument against the fitness of the Japanese for naturalization is their non-assimilability, the argument is ended, for it is preposterous to claim that a nation which has shown itself to have the greatest capacity for adaptation, against whom the severest criticism is that they are imitators, is not capable of adapting itself to our civilization.

It cannot be said that the Japanese do not come to make a home, or that they have not that earth hunger which led our ancestors to cross the sea. The earth hunger of the Japanese and the wish to make a home is the objection of California. It cannot be said that he lowers the standard of living. The "drastic investigation" authorized by the California legislature of 1909 found that the Japanese employed by white farmers were paid as much as white laborers, and that the Japanese paid more than the white man.

Race prejudice will always exist. It is innocuous in Hawaii, where the variety of race prejudices renders any dominant race prejudice impossible.

Finally, the change in the last fifty years in the habits, attitude towards the world, and the constitution of Japan is a sufficient answer.

The story of the Japanese in Hawaii is significant. They are estimated to comprise 97,000 out of a population of 228,771, exclusive of the Army and Navy (Report of the Governor of Hawaii to the Secretary of the Interior, 1916, p. 4), or 42.5 per cent.

In business, the report shows that out of 1780 independent houses of business in Honolulu the Japanese have 754; while in Hilo, out of 398, they have 248, or 1002 out of 2178, 46 per cent—slightly higher than the proportion of population.

The Japanese have the lowest percentage of convictions of crime in proportion to population, namely, 2.39 per cent, excepting the whites (including the Portuguese), who have 2.26 per cent. Excluding the Portuguese, the whites would have a higher percentage (p. 74); and the Japanese convictions are chiefly, like the Chinese, for gambling. Thus, the Japanese, although having 42.5 per cent of the population, have but 13.31 per cent of the prisoners, less than a third in proportion (p. 77). Of the delinquent and dependent boys and girls brought before the juvenile court, there were only 54 Japanese, or 9 per cent, whereas the proportion of population is 42.5 per cent. If convictions for gambling are eliminated (see report of the chief justice to the legislature), there are 1794 convictions of whites (including Portuguese), with an estimated population of 35,322, to 1686 convictions of Japanese. In other words (gambling aside), there are three white convictions to one Japanese, in ratio to population.

Much has been said about the picture brides and divorces, but from the

records of the circuit courts of Hawaii, in the same report of the chief justice, it appears that in 1916 379 divorces were granted in the territory, 193 of which were Japanese, but 8 per cent larger than the percentage to population. This result should be surprising to one who is not familiar with the care which is bestowed on marriage by that method.

Mr. M. M. Scott, for thirty-five years the honored head of the high school in Honolulu and known to every student of the Japanese, and the recipient of especial recognition by the Japanese Government for his studies of the Japanese, says of their racial origin and assimilability, in a memorandum summing up what he has published at various times:

"The Japanese people are classed as Mongolians by those who know absolutely nothing about physical anthropology. Those physical anthropologists that have studied bodily characteristics of the Japanese all agree that they do not belong to the Mongolian race, whose main habitation is in Central Asia. Kaempfer, Titsingh, Von Rein, Morse and Bachelor, who were all skilled anthropologists, feel sure that whatever mixture there may be in their racial stock, Mongolian blood is not the predominant, nor even a large element in the Japanese. Not one of them would be rash enough to say what element of blood is the predominant one. The Japanese are a very mixed race, as anyone may observe who travels from the extreme north to the extreme south of their elongated Empire.

"I have been acquainted with the Japanese people for forty-five years. I was, by invitation of the Japanese Government, for ten years from 1871 in their service in establishing a system of elementary schools throughout the country. In no one physical character do the Japanese people correspond to a like physical character of the true Mongolian. Neither in color of skin, nor pigment, nor stature, nor in measurement of limbs, above all, in 'cephalic index,' the surest character to determine race, can the Japanese be called Mongolians.

"First as to color of skin. In certain parts of Japan, regarded by their own ethnologists, the skin and pigment therein are more nearly white than yellow or brown. In the town of Sendai, in the north of the main island, the skin of the children and the women not in the fields would be taken by strangers as belonging to the white race, rather than to any of the classified colored races. Likewise, in the typical Japanese city of Kyoto, those not exposed to the heat of the summer sun are particularly white-skinned. They are whiter than the average Italian, Spaniard or Portuguese.

"As before mentioned, the one character regarded by all anthropologists as the main one, is the 'cephalic index.' Now, the 'cephalic index' of the average Japanese corresponds more nearly with the Central European skull than it does with Chinese or Mongolian. The 'cephalic index' is from eighty to eighty-two, about the same as the great Germanic race. The modern anthropologist, Ratzel, regarded the world over as one of the most distinguished on this subject, agrees with the earlier writers mentioned in the foregoing part of this sketch. As to the possibility of assimilation to American standards of government and all other things American, I regard the Japanese as one of the most assimilable of all the races of man, or what is known in the United States as the 'New Immigration.' Truth to tell, since the Japanese have become a settled people, ethnically homogeneous, they have been assimilating everything they were shown from other nations. For a thousand years, with no intercommunication, except slight ingress and egress with China and Korea, they borrowed from China and Korea letters, literature and the art of porcelain-making. They have improved by their peculiar genius on everything they borrowed from these two places.

"Since the opening of Japan by Commodore Perry in 1854 treaties and

communications with Western nations have enabled the Japanese to assimilate science, industries, commerce and politics with a rapidity that no other nation has ever shown. Their students are great admirers of American governmental forms, and even social forms. There is an immense body of men today in Japan urging a democratic and constitutional government on the model of that of the United States. There is no question but in a brief time their forms of government will be as liberal and democratic as those of England and the United States. They are immensely loyal—loyal to family and loyal to properly constituted government. Those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians. Let me repeat, and I measure my words in so doing, with nearly a half century of study and association with the Japanese, that I am persuaded that they will make as loyal and patriotic American citizens as any that we have."

IX.

No race but the Chinese being excluded from naturalization, the root stocks and the dominant strain of the Japanese being of the white race and being "free," the petitioner can not be excluded on the single ground that he is "one of the Japanese race, born in Japan."

If section 2169 is applicable, we have shown that it deals with individuals and not with races; that if construed in its original acceptation it means one not of the black race; that like the Polynesian, who are descended from the ancient Japanese, they speak an Aryan tongue and are of the Caucasian race; that the southern Japanese are certainly of the Mediterranean race from which we spring; that while the Japanese are more or less a mixed race, the dominant type is still Caucasian; that they are a people against whom the naturalization and immigration laws of the United States have never discriminated, and whose fitness for citizenship has never been denied; and that it imputes legislation inconsistent with the policy of the United States expressed in its treaties and its laws and a course of action beneath the dignity of Congress to imply that the Japanese as a race have been excluded by indirection and by inference.

CONCLUSION.

It is due to the court to say that we have inserted as part of our argument the opinions of scientific men not readily accessible in standard works, but this we have done to give the court the latest views of science on the race origin of the Japanese, a race origin in which they are intimately connected with the Polynesians, and the standard works furnish no adequate discussion upon the point in question, the material for the decision of which is now being collected by the men from whom we quote.

In conclusion, we ask this court to give to the great question submitted the informed and discriminating consideration which it deserves but has not yet received, and we confidently hope that such consideration will lead the court to hold that the United States, after extending a hand to welcome to its civilization a great and then well-contented people, did not coldly withdraw that hand, on the ground that they were among the undesirable and outcast of earth.

DAVID L. WITHINGTON,
Attorney for Petitioner.

4. BRIEF FILED BY THE ATTORNEY-GENERAL OF THE STATE OF CALIFORNIA AS AMICUS CURIAE.

STATEMENT OF FACTS.

We are to ask the court for permission to file this brief as *amicus curiae* in the above-entitled case, and also that the brief be considered in connection with the other case, which we understand is to be argued at the same time and which is entitled "*Takuji Yamashita and Charles Hio Kono, Petitioners, vs. J. Grant Hinkle, as Secretary of State of the State of Washington, Respondent,*" October term 1922, No. 177.

Each of these cases involves the question of the right of the Japanese to apply for citizenship in the United States. The answer to this question depends upon the soundness of the contention of petitioners that Japanese are "white persons" within the scope of the United States naturalization laws. The people of the State of California, along with the people of the western states generally, are of course vitally concerned in this matter and it shall be our purpose to present an analysis of the law, of statutory history, and of scientific treatises, to show that Japanese are not "white persons" within the contemplation of the United States naturalization laws.

We shall refer to the above-entitled case as the "Ozawa" case, and to the other case as the "Yamashita" case.

In the Ozawa case the petitioner was denied citizenship by the United States district court of Hawaii, because he is of the Japanese race and born in Japan. An appeal was thereupon taken to this court.

In the Yamashita case the supreme court of the State of Washington denied petitioner a writ of mandate to compel the secretary of state of said state to receive and file articles of incorporation of the Japanese Real Estate Holding Company, for the sole reason that the petitioning incorporators were natives of Japan, although they had been naturalized by a superior court of said State of Washington. The action of the defendant secretary of state was based upon a decision of the supreme court of the State of Washington, *In re Yamashita*, 30 Wash. 234. In that case one of these petitioners sought admission to the bar of the State of Washington. The supreme court decided that the above-described judgment of the superior court admitting him to citizenship was void, since he was not a "white person." A writ of *certiorari* issued to have this decision of the Washington court reviewed by the Supreme Court of the United States.

ARGUMENT.

I.

COURT DECISIONS CONSTRUING EXPRESSION "WHITE PERSONS," AS USED IN NATURALIZATION STATUTES OF UNITED STATES.

A. *Unanimity of federal and state appellate court decisions holding Japanese not "white persons," and therefore ineligible to citizenship in the United States.*

Judge Clemons of the United States district court for the Territory of Hawaii in his decision in the Ozawa case, now before the United States Supreme Court, gives a very convincing presentation of the scientific phases of this case. He shows that, irrespective of differences of opinion on the question, the great weight of scientific opinion has been that either the Malay or Mongolian or both of these stocks predominate in the Japanese race. He also shows that this weight of scientific opinion, right or wrong, has been recognized as the correct opinion by our lawmakers and our courts ever since there was any expression on the subject at all. (Vol. 4,

United States district court for Hawaii, p. 671.) As he says, at page 673: " * * * persons of the Oriental races or of the so-called 'yellow races' * * * have at all times under accepted classifications been regarded as ethnologically distinct from the white race."

At page — the court says:

" * * * no reported case is known in which a person of the Japanese race has been naturalized, in which the court has rendered a written opinion to justify its ruling or in which there has been a contest to evoke the most thorough consideration."

At page 30ff the court continues:

" * * * it is of most practical importance to bear in mind that the ethnological divisions which classed the Japanese as of the Mongolian or yellow race, were what the legislators of 1875 and the courts thereafter down even to the present have had to rely upon as their guides. See quotation in *In re Ah Yup, supra* (1878), from Webster's Dictionary, probably the most widely circulated work in America except the Bible, and even the very recent edition of the *Encyclopedia Britannica*, 11th Ed., vol. 9, p. 851. This classification was undoubtedly well known in this country early in the last century, as it was in Germany before 1790, the date of the original enactment of the statute. Even if, as the petitioner contends, Blumenbach's classification is unscientific (see *In re Dow*, 213 Fed. 355, 358, 359, 365; *In re Mudarri*, 176 Fed. 466, 467), nevertheless it has not yet been superseded so far as to assimilate the Japanese with what for many years, at least as early as 1854, and especially before 1875, has been generally regarded as the 'white' race.

"Tylor, one of the highest authorities, in his book of 1881, 'Anthropology' (Appleton's Ed. 63, 96-98), points out that the Japanese have characteristics of the 'Mongoloid type of man,' in which one prominent feature is that 'their skin is brownish yellow.' The most recent encyclopedic authority, 9 *Enc. Brit.*, 11th Ed. (1910), 851, classes the Japanese as Mongolic, or yellow, though placing the Ainos, a small element of the people of Japan, as Caucasian or white. (See also 15 *Id.* 165.) In addition to this unobstructed current of authority reference may be had to a very late work, 'A History of the Japanese People,' by Captain F. Brinkley, included by Dr. William Elliott Griffis in a list of the English scholars who 'have made obsolete most of the old European learning about Japan.' ('The Japanese Nation in Evolution,' 20.)

"The Japanese are of distinctly small stature * * *. Their neighbors, the Chinese and the Koreans, are taller * * *. Nevertheless, Professor Dr. Baelz, the most eminent authority on this subject, avers that 'the three great (36) nations of Eastern Asia are essentially of the same race,' and that observers who consider them to be distinct 'have been misled by external appearances.'" (Brinkley, History, etc., *supra*, 57-58; see also 59, 60.) That the Japanese have, however, an element of white, Caucasian or Iranian blood is noted. (*Id.*, 58, see also 45, 54, 55.)

Another recent book may be quoted as giving the opinion of a Japanese educator, "The Life and Thought of Japan," by Okakura Yoshisaburo (published by E. P. Dutton & Co., 1913):

"And as to those swarms of immigration from China and Korea, who crossed the sea at various periods in the early days of Japanese history, it did not take many generations before they came to adopt the views of the people with whom it was their interest in every way to get mixed, and thus they lost their own identity. In this manner, notwithstanding an extensive admixture of foreign elements to our original stock, we find our-

selves as closely unified a nation as if we had been perfectly homogeneous from the very beginning. One and the same blood is felt to run through our veins, characterized by one and the same set of religious and moral ideas. This may perhaps be due to the fact that the three elements—the conquering, the conquered, and the immigrating—belonged originally to the same Mongolian race, with very little trace of any mingling of Ainu and Malayan blood." (*Id.*, 48, 49.)

"You will come at least to some extent, to acknowledge the truth of the statement so often made in books on Japan, that there are two distinct racial face-types among the present Japanese * * *. Be it remembered that both these types are Mongol. Both have the yellowish skin, the straight hair, the scanty beard, the broadish skull, the more or less oblique eyes, and the somewhat high cheekbones, which characterize all well-established branches of the Mongol race." (*Id.*, 41.)

"The relation here displayed between the living and the departed may be considered as a characteristic of the Mongolian race, to which both the Japanese and the Chinese belong." (*Id.*, 54.)

Whether these views just quoted are wholly accurate or not, I do not undertake to say. They are at all events, in line with the statements of scientific works which have been, as already intimated, the guides of our courts in all cases known to have been contested or in which the court rendered a written opinion—even though recognizing that there is in the Japanese an element of white blood. (See reference to Brinkley, *supra*.)

Dr. Griffis' interesting book, in a broad spirit of tolerance, notable in one for forty years in the closest touch with Japan, and for years a resident there, goes far to demonstrate the conclusion that "the Japanese are not Mongolian." ("The Japanese Nation in Evolution," 400.) Rev. Dr. Doremus Scudder, of Honolulu, who is himself intimately acquainted with the Japanese people, and who may be termed a friend of the court, has submitted in behalf of the petitioner this authority as tending at least to support the view that the Japanese are "white persons" even in a narrow sense of those words. But Dr. Griffis, after all, does not seem to be at variance with the common authorities on ethnology. It is plain that he is speaking of the later development of the Japanese away from all that is narrow in the sense of "Mongolic," or "Oriental,"—of their "both deserving and winning success," *Id.*, 400, in competition, or rather comparison, with the most progressive and enlightened peoples of the world. He recognizes the Mongolian element constantly. "White men, belonging to the great Aryan family and speaking a language akin to the Indo-Germanic tongues, were the first 'Japanese,' who are a composite and not a pure 'Mongolian' race. Their inheritance of blood and temperament partakes of the potencies of both Europe and Asia." (*Id.*, 1, also 21, 25, 349.) He also recognizes the Malay element, which, at least "the Malay peoples of the Eastern Archipelago"—the last edition of the Encyclopedia Britannica includes in the Mongolic or yellow division of the races, though "less typical" but with the "Mongolic elements so predominant as to warrant inclusion." Says Dr. Griffis, *Id.*, 30: "Those most familiar with the races, the Mongol, Aryan and the Malay now so differentiated, consider that in the Nippon composite the Malay strain predominates."

Also *Id.*, 30-31 *et seq.* Though Dr. Griffis believes that "the basic stock of the Japanese people is Ainu" (a white people) "* * * by 'basic stock' * * * mean(ing) the oldest race in the islands" (*Id.*, 5, also 1), yet he speaks of the Ainos as having been "crowded out" (*Id.*, 9)—elsewhere characterizing the process as absorption not elimination (*Id.*, 26); and

Brinkley, History, etc., *supra*, 56 (see also 44), notes the "steady extermination for twenty-five centuries" of the Ainu element, characterized by him as having "left as little trace in the Japanese nation" (*Id.*, 58).

In re Takuji Yamashita, 70 Pac. 482. In this case the supreme court of Washington held that a Japanese was not entitled to be admitted as a citizen of the United States, and for this reason citizenship papers granted to him by the superior court of the State of Washington were void. He was therefore denied admission as an attorney and counselor at law in the courts of said state. It was this action of the supreme court of the State of Washington which serves as the basis of the respondent, secretary of state of the State of Washington, in the *Yamashita* case now before this court, refusing to receive and file articles of incorporation of the Japanese Real Estate Holding Company, prepared and executed in conformity with the general corporation laws of that state; the incorporators named in the said articles of incorporation being natives of Japan, although naturalized citizens of the United States. At page 482 of the Pacific Reporter the supreme court of Washington says:

"The question presented is whether one of the Japanese race is eligible under the naturalization laws for admission to citizenship."

"It is plain that the two races mentioned (in section 2169 R. S.) are now eligible to citizenship under the general naturalization laws; that is, white persons and persons of African (negro) descent and nativity. It is clear that within the meaning of these words the applicant is ineligible. When the naturalization law was enacted the word 'white,' applied to race, commonly referred to the Caucasian race. This is well stated in the case of *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; Webster, in his Dictionary, says: 'The common classification is that of Blumenbach, who makes five: (1) The Caucasian or white race, to which belong the greater part of the European nations and those of Western Asia; (2) the Mongolian or yellow race, occupying Tartary, China, Japan, etc.; (3) the Ethiopian or negro (black) race, occupying all Africa, except the north; (4) the American or red race, containing the Indians of North and South America; and (5) the Malay or brown race, occupying the islands of the Indian Archipelago,' etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: '(1) European, whitish; (2) American, coppery; (3) Asiatic, tawny; and (4) African, black.' Cuvier makes three: 'Caucasian, Mongol, and negro.' Others make many more, but not one includes the white or Caucasian with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics includes the Mongolian in the white or whitish race. (See New Am. Cyc. tit. 'Ethnology.')

At page 483 the supreme court of Washington further says:

"*In re Saito*, 62 Fed. 126, the federal circuit court adjudged that a native of Japan was of the Mongolian race, and therefore not eligible to naturalization."

In re Buntaro Kumagai, 163 Fed. p. 922. In this case the district court for the Western District of Washington stated as follows:

"This applicant for naturalization is an educated Japanese gentleman, and, in support of his petition to be admitted to citizenship, he presents a certificate showing that at the expiration of a term for which he enlisted as a soldier in the Regular Army of the United States, he was honorably discharged. * * *

"The general policy of our Government in regard to the naturalization of aliens has been to limit the privilege of naturalization to white people,

the only distinct departure from this general policy being soon after the close of the Civil War, when, in view of the peculiar situation of inhabitants of this country of African descent, the laws were amended so as to permit the naturalization of Africans and aliens of African descent. In the year 1862 (Act July 17, 1862, c. 200, sec. 21, 12 Stat. 597) a law was enacted in recognition of services of aliens who enlisted in the military service of this country, authorizing naturalization of aliens who should be honorably discharged from military service and that law became incorporated in title 30 of the Revised Statutes of the United States as section 2166 (U. S. Comp. St. 1901, p. 1331). As originally enacted by Congress, section 2169 merely extended the privilege of naturalization to Africans and aliens of African descent, but by the Act of 1875, to correct errors and supply omissions in the Revised Statutes, that section was amended to read as follows:

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." (Act Feb. 18, 1875, c. 80, 18 Stat. 318 [U. S. Comp. St. 1901, p. 1333].)

"As both sections are comprised in title 30, this amendment of section 2169 provides a rule of construction applicable to section 2166, and, being the latest expression of the will of Congress on the subject, it is controlling, and limits the privilege of naturalization to white persons and those of African nativity or descent. The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarcation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country. (*In re Ah Yup*, Fed. Cas. No. 104; *In re Saito* [C. C.], 62 Fed. 126; *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, 94 Am. St. Rep. 860.)

As this applicant is of a different race, the court is constrained to deny his application on the ground that the laws enacted by Congress do not extend to the people of his race the privilege of becoming naturalized citizens of this country." (Pages 923-924.)

In re Knight, 171 Fed. 299.

In this case, decided in 1909, the United States district court, East District of New York, denied application for naturalization to the applicant, who was honorably discharged from the United States Navy and who claimed the right to naturalization under the terms of the Act of July 26, 1894, chap. 165, 28 Stat. at L. 124, which gave such right to any alien of the age of twenty-one years and upward who had enlisted in the United States Navy or Marine Corps and served five consecutive years in the United States Navy and had been honorably discharged, which right was given without any previous declaration of his intention to become a citizen of the United States. (See note Fed. Stat. Ann., vol. 6, p. 1004.)

The court said that his record in the Navy was more than sufficient to meet the requirements of this Act of July 26, 1894. Knight enlisted off the coast of China upon the *Monocacy*. It appeared that he was born upon a schooner flying the British flag, in the Yellow Sea, off the coast of China; that his father was of English birth and parentage; that his mother was one-half Chinese and one-half Japanese, having been married to the applicant's father at Shanghai, under the British flag. The court says:

"The court is entirely satisfied as to the applicant's intelligence and character, and the only question arises under the provisions of section 2169 of the Revised Statutes (U. S. Comp. St. 1901, p. 1333), viz:

"This title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent."

"A person of the Mongolian race, either Chinese or Japanese, can not be naturalized, even with honorable service in the Army or Navy (*In re Buntaro Kumagai* [D. C.], 163 Fed. 922). * * * A person, one-half white and one-half of some other race, belongs to neither of those races, but is literally a half-breed."

Besho vs. United States, 178 Fed. 245. In this case the circuit court of appeals, for the Fourth Circuit, decided that a Japanese was not entitled to citizenship papers, although he made a showing under the Act of July 26, 1894, granting to aliens who have enlisted in the United States Navy and served for five years and been honorably discharged therefrom, the right to citizenship without any previous declaration of intention.

The court based its decision on the language of section 2169, Revised Statutes, limiting citizenship rights to those who are free white persons. Referring to this language the court said at page 246:

"The attention of the legislative branch of the Government was thus particularly called to the point we are now considering, and the action then taken by it is most significant, and clearly indicates that the Congress then intended to exclude all persons of the Mongolian race from the privileges of the naturalization laws."

Here we see the court treating Japanese as of the Mongolian race. At page 248 the court reviews the history of the naturalization acts of Congress as follows:

"A careful examination of the statutes relating to naturalization, commencing with act Cong., April 14, 1802, c. 28, 2 Stat. 153, and ending with the enactment of July 14, 1870, c. 254, 16 Stat. 254, discloses the fact that such statutes during all that time had in view of the purpose of preventing all aliens, not free white persons, from becoming citizens of the United States; in other words, all alien races except the Caucasians were excluded. From and including the Act of July 14, 1870, to and inclusive of the Act of June 29, 1906 (except the period between the revision of 1873, and the amendments thereof of 1875), the intention was to exclude from naturalization all aliens except those of the Caucasian and the African races. The history of the country through all the time thus indicated—to which we think we may with propriety allude—clearly develops the necessity for the legislation mentioned, and points out the purpose of the Congress in enacting it."

The court considers the argument which was urged that inasmuch as the Act of May 6, 1882 (22 Stats. 61), expressly prohibited Chinese from rights of citizenship, the Congress did not intend to prevent other aliens of the Mongolian race from being naturalized. The court says:

"We are unable to agree to this view of that act. The section referred to was evidently incorporated in the act mentioned to dispel a doubt entertained in some sections as to the sufficiency of the legislation on the subject of naturalization then in force, to prevent Chinese from being admitted as citizens. The title of the act is 'An act to execute certain treaty stipulations relating to Chinese,' and the preamble reads as follows:

"Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof."

"The fourteenth section reads thus:

"That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

"Surely there can be no serious contention concerning the ineligibility of Chinese to be naturalized under the statutes existing when this act became

a law. The court had theretofore considered such applications and rejected them. (*In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Camille* [C. C.], 6 Fed. 256.) The Supreme Court, in *Fong Yue Ting vs. U. S.*, 149 U. S. 698, 716, 13 Sup. Ct. 1016, 1023 (37 L. Ed. 905), said:

"Chinese persons not born in this country have never been recognized as citizens of the United States, nor authorized to become such under the naturalization laws."

The court is therefore of the opinion that without this express prohibition Chinese were ineligible to citizenship.

The United States circuit court of appeals, Second Circuit, in the case of *United States vs. Balsara*, 180 Fed. 694, at page 696, indicates its conclusion that a Japanese is not a member of the white race in the following language:

"We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race."

In re Young, 195 Fed. 645. In this case the United States district court of Washington, Judge Hanford writing the decision, held that an applicant for naturalization who was born in Yokohama, Japan, under the dominion of the Empire of Germany and a subject of the Emperor of Germany, whose father was a German and mother a Japanese, could not be naturalized because not a white person or of African nativity or descent. At page 646 the court said:

"The right to become a naturalized citizen of the United States depends upon parentage and blood, and not upon nationality or status."

A rehearing in this case was denied by the same court in 198 Fed., at page 715, Judge Cushman writing the decision. At pages 716 and 717 the court said:

"It is just as certain that, whether we consider the Japanese as of the Mongolian race, or the Malay race, they are not included in what are commonly understood as 'white persons.' In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it can not be said that one who is half white and half brown or yellow is a white person, as commonly understood. * * * It is not necessary to determine the exact status of the petitioner. All that is necessary is to determine whether he is a 'white person' within the meaning of the law."

The United States district court in Massachusetts in 1916, in *In re Mallari*, 239 Fed. 416, disapproved of the rule of *In re Alverto*, decided by the United States district court in Pennsylvania, in 1912, to the effect that section 30 of the Naturalization Act of 1906 must be read in connection with section 2169 of the Revised Statutes, and that therefore a Filipino, one not of the white race or of African nativity or descent, is not entitled to naturalization. We have, however, the still later decision of 1921 by the United States district court in Missouri, *Petition of Easurk Emsen Charr*, 273 Fed. 207, where the earlier rule of *In re Alverto* is approved of. This later decision dealt with a Japanese and held that he was not a "white person" and therefore could not claim the right to naturalization under the provisions of subdivision 7 of section 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918 (Compiled Statutes 1918, Compiled Statutes Annotated Supp.

1919, sec. 4352), and by the subsequent Act of July 19, 1919 (41 Statutes 222). These recent acts extended certain privileges of naturalization to those who had served in the United States military or naval forces. At pages 211 and 212 the court said:

"Incidentally it has been urged that section 2169 was repealed, by implication, by the Act of June 29, 1906 (34 Stat. 596). The contention has uniformly been rejected, and, notably, in cases involving Filipinos. (*In re Alverto* [D. C.], 198 Fed. 688; *In re Rallos* [D. C.], 241 Fed. 686; *In re Lampitoe* [D. C.], 232 Fed. 382; *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.) The Act of June 29, 1906, provided that the naturalization laws shall apply to authorize the admission to citizenship of all persons not citizens who owe allegiance to the United States, and who may become residents of any state or organized territory of the United States, on certain conditions. This was done to make possible the naturalization of citizens of the Philippine Islands and of Porto Rico, who were theretofore generally excluded because, first, the naturalization laws of the United States applied only to aliens, and, second they required a renunciation of former allegiance. It was contended that this provision of the Act of 1906 removed the inhabitants of those islands from the limitation of section 2169. A native of the Philippine Islands applied for citizenship upon that ground. Ethnologically he was found to be one-fourth white and three-fourths brown or Malay. His application was denied for the reason that he was not a white person, and section 2169 controlled and limited the provisions of the Act of 1906 as part of the general naturalization statute of the United States. (*In re Alverto, supra.*)"

In re Alverto is followed by the United States district court in New York in *In re Lampitoe*, decided in 1916 (232 Fed. 382). The court there decided that the son of a Filipino mother and a father who was half Filipino and half Spanish was not a white person and therefore not entitled to naturalization. The court said:

"The case falls exactly within *In re Alverto*, 198 Fed. 688, and needs no other consideration. * * *"

In *In re Bautista*, 245 Fed. 765, district court of California, decided on November 5, 1917, Circuit Judge Morrow held that under the Naturalization Act of 1906, section 20, a native Filipino of the Malay race owing allegiance to the United States is entitled to naturalization. The applicant for naturalization was born under Spanish rule and was therefore an alien. He was a Malay. Judge Morrow gives a very good discussion of the debates in Congress and the statutory history, from the court's point of view, leading to the conclusion that section 30 was intended to grant this right to Filipinos owing allegiance to the United States. It was necessary to pass on the point of his having been born an alien, because the claim for naturalization was made under the Act of June 30, 1914, providing that certain aliens who have served in the United States Navy or Marine Corps may be naturalized without a previous declaration of intention. Judge Morrow follows the rule of *In re Rallos*, 241 Fed. 686; *Monico Lopez*, Naval Digest 916, p. 207, and *In re Mallari*, 239 Fed. 416. A good discussion of the cases and opinions of the United States attorney-general is included in this decision.

It would appear that the most recent expression of a United States district court is to the effect that citizens of the Philippines or Porto Rico must be of the white race before they can avail themselves of the privileges of section 30.

We have been advised that the real purpose of those who drafted section 30 was to protect white persons of Porto Rico and the Philippines.

It is not, however, necessary to consider this question further, as it is not before the court at this time. Whatever may be the rights of Filipinos or Porto Ricans under section 30 of the Act of 1906, those rights accrue only when such persons "become residents of any state or organized territory of the United States," such individuals being "persons not citizens who owe permanent allegiance to the United States."

They do not owe allegiance to any foreign sovereignty and therefore under the terms of said section 30 "shall not be required to renounce allegiance to any foreign sovereignty."

The section in no way relates to Japanese owing allegiance to the Mikado of Japan and not "owing permanent allegiance to the United States."

The very most that can be said for section 30 is that it was adopted to protect Filipinos and Porto Ricans coming to the United States, even though they be of the Malay race, and who, because of their peculiar position as citizens of Porto Rico or the Philippines, owe permanent allegiance to the United States and no allegiance to any foreign sovereignty. And, as we have seen, some recent federal court decisions would limit even this right to citizens of the Philippines or of Porto Rico of the white race.

The *Petition of Easurk Emsen Charr*, United States court, Western District of Missouri, decided April 16, 1921, and on rehearing June 6, 1921, 273 Fed. 207.

This case decided that a native of Korea owing allegiance to and a subject of the Mikado of Japan, a resident of Missouri, was not a "free white person," and therefore could not claim the right to naturalization under the provisions of subdivision 7 of section 4 of the Act of June 29, 1906, as amended by the Act of May 9, 1918 (Compiled Statutes 1918, Compiled Statutes Annotated Supplement 1919, sec. 4352), and by the subsequent Act of July 19, 1919 (41 Statutes 222). These recent acts extended certain privileges of naturalization to those who had served in the United States military or naval forces, and admitted them to citizenship without many of the other proceedings and strictness of proofs which were provided and enforced under the law affecting naturalization generally. The court held that these recent enactments did not modify the rule as set forth in section 2169 of the Revised Statutes, which limits the right to naturalization to free white persons and to aliens of African nativity and to persons of African descent. At pages 209 and 210 the court says:

"(1) The meaning of section 2169 has become so far clarified by late judicial decisions that we are confronted by no embarrassments in determining the question of color in so far as that controls. In *Ex parte Dow* (D. C.), 211 Fed. 486, and *In re Dow* (D. C.), 213 Fed. 355, it was held that the words do not mean a person white in color, nor do they designate racial distinction, meaning Caucasian or Indo-European, but are to be construed rather as a geographical term, referring to the people who were commonly known in the United States as those inhabiting Europe, and whose descendants, at the time of the passage of the Act of 1790 (1 Stats. 103), formed the inhabitants of the United States, excluding Africans. In those cases, a Syrian from the Lebanon district—that is to say, from that part of the Mediterranean coast in Asia occupied in the ancient times by Phoenicians—was denied admission to citizenship upon the ground that he was not a free white person within the meaning of section 2169. The holding in those cases was rejected by the circuit court of appeals for the Fourth Circuit in the same entitled case. (226 Fed. 145, 140 C. C. A. 549.) In accordance with numerous holdings the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the

Mediterranean Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow and brown races.

"Whether or not historically the term 'Caucasian' is accurate as a designation of the white race, it is a term which appeals to common understanding and to that of the lawmakers with practical definiteness, and the term 'white person' may now be said to have a well-understood meaning. In the case at bar we are not troubled by close refinements of definition, either as to race, color, or geographical location. The petitioner is a Korean, admittedly of the Mongol family. Whatever their precise shade of color may be defined to be, they are confessed not white persons, either in fact or in accordance with common understanding, and they are about as far removed from Europe and the Mediterranean Sea as could well be imagined."

In the case of *In re En Sk Song*, 271 Fed. 23, it was held by United States District Judge Bledsoe, Southern District of California, that a native of Korea was a member of the Mongolian race, and therefore not "a free white person," and so not eligible to naturalization.

See also, for Japanese cases: *Ex parte Dow*, 213 Fed. 355 at 356, *infra*; *In re Mohan Singh*, 257 Fed. 209 at 212, *infra*; *In re Saito*, 62 Fed. 126, *infra*; *In re Geronimo Para*, 269 Fed. 643, *infra*; *Ichizo Sato vs. Harry W. Hall, Clerk to the County of Sacramento*, 34 Cal. App. Dec. 678.

In this case the district court of appeal of the State of California, Third Appellate District, decided that an order of the United States district court of the Territory of Hawaii admitting to citizenship a native of Japan is void on its face, where it recites that the person admitted is a member of the yellow race. It also decided that a member of the yellow race, and native of Japan, who served in the United States Army in the late war, is not entitled to naturalization under subdivision 7 of section 4 of the Act of Congress of May 9, 1918 (Supplement of 1918, to Fed. Stat. Annotated, p. 488), which provides that "any alien" who served in the Army or Navy during the recent war is entitled to naturalization, since the act must be read in connection with section 2169 of the Revised Statutes. At the time of the admission of Saito to citizenship he was a subject of the Empire of Japan. At page 679 the court said:

"Members of the Japanese race have never been held to be members of the white race and still less are they members of the black race. Waiving any extended inquiry into the chromatic classifications of the human race, it is sufficient to say that, under the Blumenbach and all later classifications, the members of the Japanese family have always been classed as yellow in color—by the former as belonging to the Mongolian race and by the latter as the Ural-Altaic. But by no authority have they ever been classed as Caucasian."

This case gives a very clear and exhaustive analysis of the different acts of Congress extending privileges to aliens who have served in the United States Army or Navy.

B. Chinese, being of the Mongolian or "yellow" race, held not entitled to citizenship. This, irrespective of statutory prohibition. (Fong Yue Ting vs. United States, 149 U. S. 698, at 716; In re Gee Hop, 71 Fed. 274. See In re Yamashita, 70 Pac. at 482; Bessho vs. United States, 178 Fed. 245.)

C. American Indians held not "white persons," and so, ineligible to citizenship. Are of "red" race. (In re Burton, 1 Alaska 111.)

In this case the district court of the Territory of Alaska held that an

Indian born in British Columbia is not eligible to citizenship by naturalization in the United States because he was not a white person. (See, also, *In re Camille*, 6 Sawy. 541, 6 Fed. 256; *Elk vs. Wilkins*, 112 U. S. 94.)

D. Natives of Hawaiian Islands resident in United States held of Malay or "brown" race, and not "white persons," and therefore not eligible to citizenship. (In re Kanaka Nian, 21 Pac. 993.)

In this case the supreme court of Utah denied to a native of the Hawaiian Islands whose ancestors were Kanakas the right to citizenship in the United States. The court states that the highest authorities claim the Hawaiians as among the Malay tribe and that no authorities upon such subjects classify them with either the Caucasian or the Ethiopian or black race.

E. Syrians held to be "white persons," entitled to naturalization.

In the case of *In re Najour*, 174 Fed. 735, the United States circuit court of Georgia decided that a Syrian was entitled to naturalization because he belonged to the white race. At page 735 the court said:

"Although the term 'free white person' is used in the statutes (Rev. St., sec. 2169, U. S. Comp. St. 1901, p. 1333), this expression, I think, refers to race, rather than to color, and fair or dark complexion should not be allowed to control, provided the person seeking naturalization comes within the classification of the white or Caucasian race, and I consider the Syrians as belonging to what we recognize, and what the world recognizes, as the white race."

In *Dow vs. United States*, 226 Fed. 145, the circuit court of appeals for the Fourth Circuit reversed the decisions in the district court reported in 211 Fed. 486 and on rehearing at 213 Fed. 355. The circuit court of appeals decided that a Syrian coming from that part of southwestern Asia immediately adjoining the eastern coast of the Mediterranean Sea was a white person. At pages 146 and 147 the court says:

"In 1790, when the first act was passed, immigration to this country was almost altogether from Europe; and doubtless the act of 1790 was intended mainly to provide for naturalization of aliens from Europe, and to deny naturalization to negroes. With other peoples this country had little intercourse and little concern. Accordingly the records of Congress indicate that the debates on the bill of 1790 related to European immigration. It is reasonably certain that congressmen had no knowledge of Blumenbach's classification of the races of men published in 1781, in which he makes one of the divisions the white or Caucasian race and includes in it 'the western Asiatics on this side of the Caspian Sea and the Ganges'; for his work was not translated from the German and published in English until 1807. The science of ethnology had made little advance in 1790, and the notion of racial division and the meaning of the term 'white' in a comprehensive sense as applied to men were probably quite vague and indefinite in the minds of legislators. Yet in not mentioning the people of Europe, and in extending the privilege of naturalization to any 'free white person,' it seems reasonable to think that the Congress must have believed that there were white persons natives of countries outside of Europe. The writers on the subject of that day, to say the least, were not agreed in the view that Europeans were the only white people.

"If it be assumed, however, that the preponderance of the argument is strongly in favor of the conclusion that in 1790 the popular understanding was that people of European nativity or descent were white, and that all others were colored, and that legislators had not in definite view any persons as white, except those of European nativity or descent, that would

not be conclusive of the construction to be given to the present statute. The popular conception of race division became more distinct as time went on. Blumenbach's work probably became known in this country soon after 1807, when it was published in English; and his division, though the basis of it is now discarded, seems to have been that generally accepted. The opinions of later writers are in accord with Blumenbach's that Syrians are to be classed as white people. (Pritchard, *Natural History of Man*, 1848; Pickering, *Races of Man*, 1851; Figuiet, *The Human Race*, 1872; Jeffries, *Natural History of the Human Race*, 1869; Brinton, *Races and Peoples*, 1901; Keane, *World's Peoples*, 1908.) In the *Dictionary of Races*, contained in the Reports of the Immigration Commission, 1911, it is said:

"Physically the modern Syrians are of mixed Syrian, Arabian, and even Jewish blood. They belong to the Semitic branch of the Caucasian race, thus widely differing from their rulers, the Turks, who are in origin Mongolian."

"We have, then, this condition: That in the numerous reconsiderations of the statute, when it was amended or repealed and re-enacted, the Congress must have been aware that certain Asiatics, near the Mediterranean Sea, including Syrians, were generally classed as white people. It seems to follow that, even if the Congress of 1790 considered that the law of that year would be understood to allow the naturalization of persons of European nativity or descent only, the legislators of later years could not have supposed that the term 'free white persons' would carry that restricted meaning. This growth of popular and legislative conception of the meaning of 'free white persons' from 1790 to 1875, the date of the last enactment on the subject, is the controlling factor in ascertaining the meaning legislators intended should be given to the words as they stand in the present law."

The case of *Ex parte Dow* was originally reported in 211 Federal 486. A rehearing was granted and the same conclusion reached by the United States district court, East District of South Carolina in 213 Fed. 355. This decision was reversed by the United States circuit court of appeals for the Fourth Circuit in *Dow vs. United States*, reported in 226 Federal, at page 145.

The decision of the district court was to the effect that a Syrian, native of Syria in southwestern Asia near the eastern coast of the Mediterranean, was not a "free white person" and was therefore not eligible to naturalization in the United States under the language of section 2169 of the Revised Statutes. District Judge Smith in his two opinions went into the question of the history of the Syrian people very exhaustively. He does not base his conclusion on the assumption that a Syrian was not a white person from a racial or ethnological standpoint, but rather that the proper construction of the original Naturalization Act of 1790 must lead to the conclusion that the framers of that act had in mind geographical rather than racial considerations. He points out that at the time of Blumenbach's classification of the races of men published in 1781, in which he makes one of the divisions the white or Caucasian race and includes in it "western Asiatics on this side of the Caspian Sea and the Ganges," this authority could not have been known to the members of Congress in 1790, as this work was not translated from the German and published in English until 1807.

Judge Smith determined first that "free white persons" could not mean necessarily white in color inasmuch as such a definition had been rejected by the great weight of authority and the decisions of the United States courts, that it had been held that the right of an applicant for citizenship is not to be determined by the question of whether upon ocular inspection he may, in the opinion of the judge, be actually white in color.

Second, the judge decided that the definition is not racial solely and that "white" is not to be interpreted as meaning Caucasian, so called, or Indo-European. On this branch of the subject the judge discussed the philological phase of the matter with reference to languages spoken by the people theretofore denominated Caucasian. He pointed out that many peoples speaking one of the dialects of the Indo-European language, as for instance, such a branch as Sanskrit, could not be considered racially as whites; that is, in many instances the Aryan or Indo-European language would be imposed upon a conquered people by their conquerors, and in other cases the conquerors spoke the language of those whom they conquered. There would, therefore, be great uncertainty in tracing a race solely by the language of that race.

The judge then took up the third phase of his discussion, the geographical one, and drew the conclusion that by the use of the word "white" in the statute in the year 1790 the Congress undoubtedly was referring to peoples then commonly known in this country as peoples inhabiting Europe whose descendants at that time formed the inhabitants of the United States, excluding of course from such consideration the African descendants who were slaves. He held that "white" was used in the sense of European, which would include many people who would not come within the definition of "Caucasian" or "Indo-European." The only point decided was that the Syrian applicant—

"is not that particular free white person to whom the act of Congress has donated the privilege of citizenship in this country with its accompanying duties and responsibilities.

"In donating this privilege the people of the United States have seen fit under the description of free white persons to restrict the privilege as extended to such foreigners to persons of European habitation and European descent. The applicant being an Asiatic does not come within the terms of the statute, and whatever may be his other qualifications, Congress has not seen fit to endow him with the right to be admitted a citizen of the country."

In the decision rendered on rehearing the same points were made by Judge Smith. At page 357 of 213 Federal Reporter the judge said:

"The previous decision in this case was that the term 'white persons,' as used in the statute, meant persons of European nativity or European descent. The applicant was excluded because he was an Asiatic and not an European. Whether he belonged to a white race or not was not decided as not pertinent to the issue."

The court, at page 356, indicated that it did not consider Japanese as entitled to citizenship, in the following language:

"That this (the privilege of citizenship) should be refused to him is no real ground for humiliation. Congress has admittedly seen fit to exclude from that privilege Chinese, Japanese, Malays, Mongols generally, and American Indians. It is no more a humiliation for a Syrian to be excluded from a privilege (not a right) than it is to an educated and cultivated person from China, Japan, or the Malay Peninsula."

At page 358 and following the court gives an interesting discussion on the origin of the expression "Caucasian" as follows:

"The term 'Caucasian' in its application to race originated with one Blumenbach, who in 1781 published in German a work attempting to classify the races of mankind in which he classed as 'Caucasian' the inhabitants of Europe and of the Caucasus and of Asia Minor, western Asia including Syria, and of northern Africa.

"Blumenbach determined his classification neither by complexion nor by

philological or scientific ethnological principles as now understood. He put together as one race in his own words 'altogether the inhabitants of the world known by the ancient Grecians and Romans.' The peoples possessing according to Blumenbach 'according to European ideas of beauty the form of the face and skull most perfect.' For the designation 'Caucasian' he was indebted to the following circumstances:

"Of all the odd myths that have arisen in the scientific world, the "Caucasian mystery" invented quite innocently by Blumenbach is the oldest. A Georgian woman's skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as derivations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic "Adamic" man and his country the primitive center of our kind.' (Huxley, *Methods and Results of Ethnology* [Ed. of 1894].)

"Or as said by Latham:

"Blumenbach had a solitary Georgian skull and that skull was the finest in his collection, that of a Greek being the next. Hence it was taken as the type of the skull of the more organized division of our species. More than this, it gave its name to the type and introduced the term Caucasian. Never has a single head done more harm to science than was done in the way of posthumous mischief by this well-shaped head of a female from Georgia.' (Latham, 'The Nationalities of Europe.')

"The scientific conclusion of scholars of the present day is that the inhabitants of the Caucasus are to be classed with the Mongols, and not with the Europeans, so that Blumenbach derived his term from a skull more likely to have been Mongolian than European, or it may be the skull of some traveler or captive in the Caucasus.

"The ill-chosen name of Caucasian invented by Blumenbach in allusion to a South Caucasian skull of especially typical proportions, and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races.' (E. B. Tylor in article on Anthropology, *Encyclo. Brit.* [11th Ed.].)"

There then follows an interesting philological study and in particular with reference to all persons speaking or having spoken one of the so-called Aryan tongues, that is one of the Sanscrit, Iranian, Slavonic, Gothic, Celtic, Latin, Greek group of languages, which persons were generally recognized, if that test were applied, as belonging to the white race. The court explains how such a sole test would lead to absurd results. The court also shows how Blumenbach, who does not appear to have known either the Sanscrit or Iranian tongues, based the origin of the white race as in the Caucasus Mountains, which range of mountains stretches along southeastern Russia from the Black Sea to the Caspian Sea. This would make the origin of the white race in southwestern Asia. The term "Aryan" has been succeeded largely by the term "Indo-European." The successors of Blumenbach removed the origin of the white race to the Hindoo-Koosh-Pamir region or in the region of northern India. Latham attempted to place it on the Sarmatian Plain west of the Volga.

At page 366 Judge Smith sums up his conclusion as follows:

"Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them? If he is, he is entitled to naturalization if he be otherwise fit for it. If he is not, if he is an Asiatic, whether Chinese, Japanese, Hindoo, Parsee,

Persian, Mongol, Malay, or Syrian, he is not entitled to the privilege of naturalization, no matter what his fitness otherwise may be."

The basis for the reversal of this judgment, which we find in *Dow vs. United States*, 226 Fed. 145, is that while the Congress in 1790 doubtless considered the expression "free white persons" as being peculiarly applicable to Europeans and descendants of Europeans, nevertheless this Naturalization Act had been amended by Congress at various times over a period from 1790 to 1875, and that without question during that period of time it was well understood in this country that the expression "white persons" was applicable to others than Europeans, and among others, to Syrians.

F. Armenians held to be "white persons" and entitled to naturalization. (In re Halladjian et al., 174 Fed. 834.)

In this case it was held by the United States circuit court, District of Massachusetts, that certain Armenians, all born in Asiatic Turkey, were free white persons entitled to be naturalized in the United States. The court held against the theory that "white persons" was to be construed as synonymous with "European," there being in fact no "European" or "white" race as a distinctive class, or "Asiatic" or "yellow" race, including substantially all the people of Asia; and that therefore the term "free white persons" included Armenians born in Asiatic Turkey and on the west side of the Bosphorus. The real point of this decision is that the history of Asiatic Turkey shows that these Armenians were of the white or Caucasian race. At page 840 the court says:

"If, however, * * * we are compelled by statute to classify for the purposes of American naturalization every man living on the earth as a member of some one race, we shall find that the Armenians have always been classified in the white or Caucasian race, and not in the yellow or Mongolian."

Scientific authorities are referred to by the court in *In re Halladjian*, 174 Fed. 834, at 840. For the proposition that Armenians are to be classed as white or Caucasian, rather than as Mongolian or yellow, the court says:

"This court can not be expected in any reasonable time to get a thorough education in ethnology, especially in modern ethnological theories. Its information is got at second or third hand; but a casual examination of books on ethnology, standing together on the shelves of a large library, old and new, weighty and unimportant, shows complete agreement in the proposition that Armenians are to be classed as white or Caucasian, rather than as Mongolian or yellow. Figuiet, Brace, Keane, Pickering, Brinton, Hutchinson, Jeffries, Pritchett, and Retzel, authors taken quite at random, all reach the same conclusion. This is true of Blumenbach, an influential author of the eighteenth century, and of Quatrefages and Huxley about a century later. Cuvier expressly included Armenians, as well as Hindus, in the Caucasian race, as distinguished from the Mongolian. With this agree modern travelers, such as Bryce and W. H. Ward. Some modern ethnologists, indeed, reject altogether the "Caucasian or white" classification; but their theories do not help the United States. Ripley, for example, asserts that there is no 'European or white race,' and that there are three great races to be found in Europe, one of which may have come from Africa across the Mediterranean. Topinard, as quoted by Ripley, has said:

"'Race in the present state of things is an abstract conception, a notion of continuity in discontinuity, of unity in diversity. It is the rehabilitation of a real but directly unattainable thing.'"

G. Hindus held to be "white persons" and entitled to naturalization. (In re Mohan Singh, 257 Fed. 209.)

In this case the United States district court, Southern District of California, held that a certain Hindu from India was a member of the Aryan branch of the Caucasian race and therefore entitled to be naturalized. The court, at page 212, cites with approval the language from the Balsara case, to the effect that Japanese do not belong to the white race.

United States vs. Balsara, 180 Fed. 694.

In this case the United States circuit court of appeals, Second Circuit, held that a Parsee from India is a member of the white or Caucasian race and therefore entitled to admission to citizenship.

In re Bhagat Singh Thind, 268 Fed. 683.

In this case, decided October 18, 1920, the United States district court in Oregon held that the high-class Hindu, coming from Punjab in the north-west part of India, is ethnologically a white person so as to entitle him to the rights of naturalization in the United States. The decision is based upon former decisions; that is *In re Mohan Singh* (D. C.), 257 Fed. 209; *In re Halladjian* (C. C.), 174 Fed. 834, and *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.

II.

STATUTORY HISTORY OF UNITED STATES NATURALIZATION STATUTES, AND COURT REFERENCES THERETO, SHOW THAT EXPRESSION "WHITE PERSONS" WAS USED TO EXCLUDE THE MONGOLIAN-MALAY TYPE.

At page 22 of brief for petitioners, in the Yamashita case, it is stated that—

"Congress in repeating without qualification the words 'white persons' has left the subject in great uncertainty * * *. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the act of 1870, and after that date, as having no practical significance."

We respectfully submit that the above statement from the brief for petitioners ignores the history of the amendments to the original Naturalization Act, which history has been commented on by various United States courts and by members of Congress in their debates.

It also ignores the history of the times paralleling and coincident with these different amendments, throughout which amendments the expression "white persons" was always retained and of course must have been used in view of the commonly accepted understanding that the Japanese belonged to the so-called yellow-brown or Mongolian-Malay race. If this yellow or brown race was not recognized as such in distinction to the white race and as being a part of the population of America when the first Naturalization Act was adopted in 1790, it certainly was throughout the later years when Congress adopted naturalization legislation without any change in the expression "white persons." As late as June 29, 1906, Congress adopted "an act to establish a bureau of immigration and naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States." This act, a comprehensive revision of the Naturalization Code, left section 2169 of the Revised Statutes intact. Section 26 of the 1906 Act expressly repealed sections 2165, 2167, 2168 and 2173 of the Revised Statutes, but did not repeal section 2169. It is of course clear that in the year 1906 the Japanese were recognized by the American people as not being of the white race. The entire problem of the Chinese and Japanese and other Mongolian and Malay peoples had, years prior to 1906, been very clearly presented to and understood by Congress.

As said by Judge Clemons in the *Ozawa* case at page 685 of volume 4, United States district court for Hawaii:

"As lately as 1906 Congress went over the whole law of naturalization, and yet in the face of the well-known rulings of the published decisions which had interpreted the particular section here in question, the section was left just as it was. This is a very persuasive reason for the conclusion that Congress acquiesced in, and adopted, the interpretation which the courts had put upon its own work. (226 Fed. 145, 148.)"

The first Naturalization Act was the Act of March 26, 1790 (1 U. S. Stat. at L., p. 103.) Section I provided that "any alien being a free white person, * * * may be admitted to become a citizen of the United States."

This was repealed five years later by the Act of January 29, 1795 (1 U. S. Stat. at L., p. 414). Section 1 of this repealing act repeated and continued the identical above-quoted language found in the Act of 1790.

The Act of 1795 was in turn repealed about seven years later by the Act of April 14, 1802 (2 U. S. Stat. at L., p. 153).

The 1802 act, in section 1 thereof, again repeated and continued the identical language.

Two years later a supplemental Act of March 26, 1804, again repeated this identical language (2 U. S. Stat. at L., p. 292).

Twenty years thereafter a supplemental Act of May 26, 1824, in section 1 thereof, again repeated the identical language (4 U. S. Stat. at L., p. 69).

Four years later an act adopted May 24, 1828, amended section 2 of the Act of April 14, 1802, and included the identical language (4 U. S. Stat. at L., p. 310).

In the year 1870, after the Civil War and in view of the peculiar position of inhabitants of African descent in this country, Congress amended the law so as to permit the naturalization of Africans and aliens of African descent (Act of July 14, 1870, 16 U. S. Stat. at L., 254). In 1873 the Revised Statutes were codified and this permission to Africans and aliens of African descent was included in section 2169 of the Revised Statutes. Through an oversight of the codifiers, however, the language "free white persons" was omitted. This omission was corrected in 1875 by the act to correct errors and supply omissions in the Revised Statutes. (This is the Act of February 18, 1875, 18 Stat. at L., 316). The statute reads:

"That for the purpose of correcting errors and supplying omissions in the act entitled 'An act to revise and consolidate the statutes of the United States in force on the first day of December, anno Domini eighteen hundred and seventy-three,' so as to make the same truly express such laws, the following amendments are hereby made therein: * * *. Section two thousand one hundred and sixty-nine is amended by inserting in the first line, after the word 'aliens' the words 'being free white persons, and to aliens.'"

This amendment refers to the Revised Statutes of 1873, section 2169, page 382. After the amendment the said section 2169 read as follows (the amendment being noted in brackets):

"The provisions of this title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent."

The title so referred to is title 30 of the Revised Statutes, entitled "Naturalization."

The United States circuit court in *In re Saito*, 62 Fed. 126, at page 127, refers to the Act of February 18, 1875, to correct errors and supply omissions in the first revision made in 1873 of the United States Statutes. It was in this Act of 1875 that the codification of section 2169 of the Revised Statutes was amended by restoring the words "free white persons." The

court states that in moving to adopt this amendment in the House it was stated that this omission of the revision of 1873 operated to extend naturalization to all classes of aliens and especially to the Asiatics; and that a few years theretofore the proposition of Mr. Sumner in the Senate to strike out the word "white" had been defeated and that the committee only proposed, by restoring these words, to place the law where it stood at the time of the revision in 1873. Reference is made by the court to the fact that the debate that followed proceeded on the assumption that by restoring the word "white" the Asiatics would be excluded from naturalization, and further that the amendment was adopted with this understanding of its effect.

The court refers to vol. 3, part II, Congressional Record, 43d Congress, Second Session, January 28 to February 23, 1875, page 1081.

It will be of value to quote from this Congressional Record. Mr. Poland on behalf of the committee on revision of the laws was addressing himself to the amendment to restore this language to section 2169 and spoke to the question as follows:

"There is one other matter immediately following this on the same page. I will read the paragraph:

"Section 2169 is amended by inserting in the first line, after the word 'alien,' the words 'being free white persons, and to aliens.'

"The original naturalization laws only extended to free 'white' persons. That was the condition of the naturalization laws for a great many years. A very few years since, upon some bill, Mr. Sumner of Massachusetts, then in the Senate, moved to strike out the word 'white' from the naturalization laws, and it was objected to upon the ground that that would authorize the naturalization of this class of Asiatic immigrants that are so plentiful upon the Pacific Coast. After considerable debate, instead of striking out the word 'white,' it was provided that the naturalization laws should extend to Africans and persons of African descent. Precisely what the view of the gentleman was who revised the naturalization laws, I am unable to determine. He has left out the word 'white' but has kept in the provision in relation to Africans and persons of African descent. The leaving out of the word 'white' would seem to leave the naturalization to extend to every species of alien, but that evidently was not the idea of the gentleman who revised that chapter, because he kept in the provision in relation to Africans or persons of African descent. We have proposed by this amendment to restore the law to just the condition in which it was before the revision was made.

"The member of our committee who had this chapter on the naturalization laws to examine as a subcommittee failed to notice this change in the law or it would have been brought before the House when the revision was adopted."

Mr. Willard, of Vermont, then addressed himself to the question as follows:

"I understand that the committee on the revision of the laws do not make this recommendation upon the merits of the question at all, but simply upon the general principle upon which they are proceeding, to restore this revision as nearly as possible to the condition in which the law was at the time the revision was passed. It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word 'white' stricken out, is not a wise statute. I understand that members from California and the Pacific Coast make objection to the naturalization of

Asiatics, more especially the Chinese. That question has been before Congress at different times. As has been suggested by my colleague (Mr. Poland) it was squarely presented in the Senate by the proposition of Mr. Sumner to strike out the word 'white' from the naturalization laws.

"I can not see why there should be this invidious distinction made against any class of foreigners. We invite immigrants to this country from all countries; we open our ports wide to every immigrant who comes to our shores. And if this word 'white' shall be restored we will keep upon our statute a provision by which only a portion of those who come to this country can be naturalized, and certainly, as far as we know, not by any means necessarily the least intelligent portion of the emigrants who come here. I merely call the attention of the House to this matter for the purpose of suggesting that if they are ready to say that this word 'white' should be retained in the naturalization laws on principle, or on the merits of the question, of course it is proper for them to say so. But I think it is a good time now, inasmuch as we have it out of the law, to let it remain out. As my colleague has yielded to me for the purpose of allowing an amendment to be moved to this bill, I will move to amend it by striking out the paragraph relating to this subject, which will leave the naturalization law to stand as the revisers left it, with the word 'white' not in it at all. The paragraph I move to strike out is as follows:

"Section 2169 is amended by inserting in the first line, after the word 'alien,' the words 'being free white persons, and to aliens.'"

This motion was defeated and the amendment as proposed by the committee was adopted.

The opinion is of value from the standpoint, first, of discussion of the racial characteristics of the Japanese and Chinese; second, of the intention of Congress to include the Chinese and Japanese as excluded from the privilege of naturalization, as is shown by the history of the naturalization acts and debates in Congress and, third, a discussion of the adjudicated cases.

After quoting the provisions of section 2169 of the Revised Statutes, to the effect that the provisions of the title on naturalization shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent, the court says:

"The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term 'white persons.'

"These words were incorporated in the naturalization laws as early as 1802. (2 Stat. 154.) At that time the country was inhabited by three races, the Caucasian or white race, the negro or black race, and the American or red race. It is reasonable, therefore, to infer that when Congress, in designating the class of persons who could be naturalized, inserted the qualifying word 'white,' it intended to exclude from the privilege of citizenship all alien races except the Caucasian.

"But we are not without more direct evidence of legislative intent. In 1870, after the adoption of the Thirteenth Amendment to the Constitution, prohibiting slavery, and the Fourteenth Amendment, declaring who shall be citizens, the question of extending the privileges of citizenship to all races of aliens came before Congress for consideration. At that time, Charles Sumner proposed to strike out the word 'white' from the statute; and in the long debate which followed the argument on the part of the opposition was that this change would permit the Chinese (and therefore the Japanese) to become naturalized citizens, and the reply of those who favored the change was that this was the very purpose of the proposed amendment. (Cong.

Globe, 1869-70, pt. 6, p. 5121.) The amendment was finally rejected, and the present provision substituted, extending the naturalization laws to the African race.

"Again in the first revision of the statutes, in 1873, the words 'being free white persons' were omitted, probably through inadvertence. Under the Act of February 18, 1875, to correct errors and supply omissions in the first revision, this section of the statute was amended by inserting or restoring these words. In moving to adopt this amendment in the House, it was stated that this omission operated to extend naturalization to all classes of aliens, and especially to the Asiatics; and reference was made to the fact that a few years before, the proposition of Mr. Sumner, in the Senate, to strike out the word 'white,' had been defeated, and that the committee only proposed, by restoring these words, to place the law where it stood at the time of the revision. The debate which followed proceeded on the assumption that by restoring the word 'white' the Asiatics would be excluded from naturalization, and the amendment was adopted with this understanding of its effect. (3 Cong. Rec., pt. 2, p. 1081.)

"The history of legislation on this subject shows that Congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

"The words of a statute are to be taken in their ordinary sense unless it can be shown that they are used in a technical sense.

"From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow and brown races.

"And this is true from a scientific point of view. Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies at the foundation of the classification which scientists have adopted. (Blumenbach, in 1781, divided mankind into five principal types, the Caucasian or white, Mongolian or yellow, Ethiopian or black, American or red, and Malay or brown.) Cuvier simplified this classification into Caucasian, Mongol, and negro, or white, yellow and black races. Other writers make a still larger number of distinct races. It is said that Prof. Huxley's division of mankind is the most satisfactory. He distinguishes four principal types, and he points out the marked physical characteristics of each. These types are the Australioid (chocolate brown), Negroid (brown black), Mongoloid (yellow), and Xanthochroic (fair whites). To these he adds a fifth variety, the Melanochroic (dark whites). The 'fair whites' are the type of the prevalent inhabitants of northern Europe; and the 'dark whites,' of southern Europe. All these physical differences do not exist in the case of each individual, and 'innumerable varieties of mankind run into one another by insensible degrees;' but, taking the race or type as a whole, their peculiarities are sufficiently distinct to form the basis of well-recognized classification. (Enc. Brit., tit. 'Anthropology.')

"Before the Act of May 6, 1882 (22 Stat. 58, 61), which prohibited the naturalization of Chinese, or when the Chinese and Japanese stood on the same footing under the law, the question of the right to naturalize a

Chinaman came before Judge Sawyer in the case *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104, and, in a well-considered opinion, the court denied the application. (See, also, *In re Camille*, 6 Sawy. 541 6 Fed. 256; *Elk vs. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41; *Fong Yue Ting vs. U. S.*, 149 U. S. 698, 716, 13 Sup. Ct. 1016.)

"Whether this question is viewed in the light of congressional intent or of the popular or scientific meaning of 'white persons,' or of the authority of adjudicated cases, the only conclusion I am able to reach, after careful consideration, is that the present application must be denied.

"Application denied."

The Act of May 6, 1882 (22 Stat. 58, 61), prohibiting the naturalization of Chinese, was an unnecessary act, inasmuch as the courts had theretofore determined that Chinese were not entitled to naturalization in this country.

See *In re Ah Yup*, Federal Cases No. 104, decided by the U. S. circuit court, District of California, in 1878.

On June 29, 1906, there was adopted a new naturalization statute providing a complete procedure for naturalization. As we above pointed out, this act repealed sections 2165, 2167, 2168 and 2173 of the Revised Statutes, but left intact section 2169, which limits naturalization rights to white persons and those of African nativity or descent. (See 6 Fed. Stat. Ann. p. 1001.)

As late as 1918, during the recent war, Congress passed an act granting to any alien who had served in the military or naval forces of the United States special privileges in the matter of naturalization.

In the case of *In re En Sk Song*, 271 Fed. 23, United States District Judge Bledsoe, Southern District of California, held that this act of Congress of May 9, 1918 (40 Statutes, 542), eliminating certain requirements for the naturalization of aliens who had served in the United States Army or Navy during the recent war, did not in any way affect the provisions of section 2169 which limited the right to naturalization to free white persons. That is, it was held that reliance could not be had on that provision of said 1918 amendment which stated that "any alien serving in the military or naval service of the United States," etc., may file a petition for naturalization, without making the preliminary declaration of intention, and without proof of the required five years' residence within the United States. The court decided that "any alien" must be read in connection with the theretofore existing provision of section 2169.

The above Act of May 9, 1918, takes the place of section 2166 of the Revised Statutes, which is found in volume 6, Federal Stat. Ann., 2d Ed., page 941, and which was the Act of July 17, 1862.

In the year 1908 the United States district court for the Western District of Washington considered said section 2166 and recognized this expression "white persons" as excluding Japanese. This was the case of *In re Buntaro Kumagai*, 163 Fed., page 922, where the court decided that a Japanese was not entitled to claim the privileges of the Act of July 17, 1862 (12 Stat. at L. 597), which statute recognized the services of aliens who enlisted in the military service of the United States and authorized naturalization of such aliens when honorably discharged from such service. The court decided that the statute of 1862 must be read in connection with the statute which had been on the books ever since 1790 and limiting the privilege of naturalization to "white persons."

Counsel for petitioners are therefore in error when at page 3 of their brief in the Yamashita case they state that this Act of 1862 constituted an exception to the general rule limiting naturalization privileges to white persons. The same mistake is made in referring to the statute of June

7, 1872 (17 Stat. at L. 262, 268), granting certain privileges of naturalization to seamen on United States merchant ships.

In the case of *United States vs. Balsara*, 180 Fed. 694, at pages 696 and 697, the United States circuit court of appeals, Second Circuit, enunciates the rule that the Act of June 29, 1906, revising the naturalization law does not by implication repeal section 2169 of the Revised Statutes.

In re Geronimo Para, 269 Fed. 643, was decided by the United States district court in New York on May 3, 1919. In this case it was held that the Act of June 29, 1906, as amended by Act of May 9, 1918 (Compiled Statutes 1918, Compiled Statutes Annotated Supp. 1919, sec. 4352), relative to the naturalization of "any alien," Porto Rican, or Filipino serving in the Army or Navy merely provides for more expeditious and favorable terms of admission for such persons than existed before and does not extend the right of naturalization to aliens other than free white persons, aliens of African nativity and persons of African descent. It was therefore held that a Japanese was not entitled to naturalization; also that a South American Indian was not entitled to naturalization. At page 643 the court said:

"The Government contends that naturalization is under any circumstances restricted to free white persons, persons of African descent, and native-born Filipinos and Porto Ricans. Heretofore persons eligible for naturalization have not included Indians, Malays, or Mongolians." (Citing cases.)

A reading of the Naturalization Act of June 29, 1906 (34 Stat. at L. 596) clearly shows that there was no intention in said act to in any way affect the long-existing rule limiting the rights of citizenship to white persons and those of the African race and African descent. The statute was adopted in recognition of that rule and has been uniformly construed by the courts as in no way intending to change the rule that has existed for over a century and a quarter with reference to white persons, and since 1870 with reference to negroes.

Section 1 of the act changes the designation of the bureau of immigration and the department of labor to the "bureau of immigration and naturalization" and states that this bureau shall have charge of all matters pertaining to the naturalization of aliens.

Section 2 is a temporary section providing for offices, etc.

Section 3 determines the courts that shall have jurisdiction over naturalization.

Section 4 enumerates the manner in which an alien may become a citizen of the United States. That is, it determines with reference to declaration of intention, petition for citizenship certificates, certificates of arrival and intention, declarations, evidence of residence, etc. Subdivision second of section 4 expressly recognizes a certain class of persons "authorized and qualified under existing law to become a citizen of the United States," who because of misinformation in regard to citizenship or the requirements of the law have labored under the impression that they could become citizens of the United States and in good faith exercised the rights or duties of a citizen because of such wrongful information or belief. Here and throughout the act we find an express recognition of existing law, which law is referred to as determining qualifications for citizenship.

Section 5 provides for a public notice of the petition.

Section 6 provides for filing and docketing of petitions and for the hearings.

Section 7 prohibits naturalization to anarchists or polygamists irrespective of their race.

Section 8 requires that the applicant must be able to speak the English language.

Section 9 provides for final hearings being held in open court.

Section 10 refers to evidence of residence.

Section 11 provides for opposition by the United States Government to applications for citizenship.

Section 12 provides for the duties of the clerk of the court.

Section 13 provides for the fees that must be paid.

Section 14 provides for the binding of papers.

Section 15 refers to the proceedings to cancel certificates illegally secured.

Sections 20, 21, 22, 23, 24 and 25 provide for punishment for violations of the act.

Section 26 is the express repealing section of the act, and while it repeals sections 2165, 2167, 2168 and 2173 of the Revised Statutes, it does not repeal section 2169 of the Revised Statutes. This in itself is conclusive on this point of section 2169 being still in full force and effect.

Section 27 provides for forms of petitions, declarations, etc.

Section 28 authorizes the secretary of commerce and labor to make rules and regulations.

Section 30 provides for naturalization of persons owing allegiance to the United States, but not United States citizens.

The above analysis of the 1906 Act would seem to establish that the courts and Government officials have undoubtedly expressed the correct rule when they have so often decided that section 2169 of the Revised Statutes is in no way in conflict with but rather is supplemental to the 1906 statute.

We know of no authority to the contrary and we met with this suggestion for the first time in the brief for petitioner in the Ozawa case now pending in this court.

The Act of June 29, 1906, provides for "a uniform rule for the naturalization of aliens throughout the United States." It describes the "manner" in which an alien may become a citizen of the United States. It does not, however, purport to include all of the statutory provisions of the United States on the subject of naturalization. It did not repeal any of the laws relating to the naturalization of aliens, except those set forth in section 26 of the act, including any acts inconsistent with the said Act of 1906.

Section 2169 of the Revised Statutes describes the races which Congress determined might be naturalized. The Act of June 29, 1906, describes the manner and the procedure and conditions under which those races so described in section 2169 might be naturalized. If Congress had intended to make the 1906 Act complete in itself, it would have repealed title XXX of the Revised Statutes and reenacted those sections thereof to be kept alive by including them in the Act of 1906.

Counsel for petitioner in the Ozawa case, at pages 15 and following, urge that the history of section 2169 of the Revised Statutes shows that it was never intended to be a restrictive statute limiting the rights of citizenship to those of the Caucasian and African races, but rather that it was an enlarging statute to extend the right to those of African nativity and of African descent. It is further argued that the language in the section that "*the provisions of this title shall apply to aliens, being free white persons and to aliens of African nativity and to persons of African descent,*" indicates that any limitation to such white persons and aliens of African nativity and persons of African descent must be considered only with reference to "*the provisions of this title,*" that is, title XXX of the Revised Statutes.

It is pointed out that the Naturalization Act of June 29, 1906, appears to be all comprehensive and complete and is not a part of said title XXX. From this it is concluded that any restriction of the right of naturalization

to whites and such Africans as above described must be a restriction only concerning those other sections of said title XXX which grant rights of naturalization. It is urged that we must look to these other unrepealed sections in title XXX, as, for instance, section 2166, applying to aliens honorably discharged from the military service and section 2174 applying to naturalization of certain seamen. These last sections were unrepealed at the time of the 1906 Act. They have, however, since been repealed by the Act of May 9, 1918 (Fed. Stat. Ann. Supp. 1918, p. 488), which takes the place of sections 2166 and 2174.

This ingenious argument would set aside the construction by the courts over a period of many years and recognition by Congress in repeated legislative sessions of this judicial construction as expressing the real intent of Congress.

From 1790 to 1870, a period of eighty years, we had, not as a part of any title XXX, the substantive naturalization law limiting the rights of naturalization to free white persons. In 1870 was enacted the statute of July 14, 1870 (16 Stat. at L., 256), which extended this right to those of African nativity and African descent. This statute again was not a part of any title of Revised Statutes, the revision not coming until the year 1874, being approved June 22, 1874 (Revised Stats. of the United States, 1873-1874, p. 1092, for approval thereof).

Then for the first time in 1874 we have the Revised Statutes. Through an oversight the restriction limiting the rights of naturalization to free white persons and to those of African nativity or descent was omitted from the Revised Statutes. This was cured by the amendment of 1875 as soon as Congress discovered the error of the codifiers, by incorporating the language which existed throughout these years from 1790 to 1870, so far as whites are concerned, and from 1870 to 1875, so far as Africans are concerned, in section 2169 of the Revised Statutes. From the year 1875 down to the Naturalization Act of 1906 we have these controlling provisions included within the Revised Statutes. Not only the substantive Naturalization Act stating the conditions under which aliens might become naturalized, but the limitations thereon to free whites and those of African nativity or descent were found from 1875 down to 1906 in the Revised Statutes.

During this period of about thirty-one years Congress and the courts treated these sections of the Revised Statutes exactly as they had for the eighty-year period from 1790 to 1870 treated the substantive Naturalization Acts of Congress. The only difference was that this substantive Naturalization Law was codified into sections of the Revised Statutes. Then in 1906 Congress adopted the present Naturalization Act. For the sixteen years subsequent thereto the courts have consistently ruled that section 2169 of the Revised Statutes, which was not repealed by the 1906 Act, has remained in full force and effect, not only with reference to other sections of the Revised Statutes but also with direct reference to the 1906 Act. Over and over again have the courts declared that rights claimed under the 1906 Act must be controlled and limited by section 2169 of the Revised Statutes. Congress has met every two years during this sixteen-year period, and knowing of these court decisions has certainly considered them as a proper expression of the legislative intent not to modify the Naturalization Law so as to remove the limitations of section 2169.

Indeed today the only section left of these pertinent sections of the Revised Statutes is section 2169. The 1906 Act repealed sections 2165, 2167, 2168 and 2173 of the Revised Statutes. The Act of May 9, 1918, repealed sections 2166 and 2174 of the Revised Statutes. That leaves then sections 2169,

2170, 2171 and 2172. Section 2170 is the five-year residence requirement. Section 2171 refers to alien enemies not being admitted. Section 2172 refers to children of persons naturalized under certain laws. There is nothing in these sections for section 2169 to operate upon. How ridiculous then it would be to consider that Congress has specifically throughout all these years retained section 2169 for no purpose whatever. The only purpose, of course, of specifically retaining section 2169 and refusing to repeal it along with other repealed sections was that the rule might remain as it has always been and as construed by the courts, with Congress so understanding this judicial construction. This rule is and always has been that no alien is entitled to naturalization unless he is included within such races of people as Congress has affirmatively stated are entitled to the rights of naturalization.

To say that the Act of 1870 extending the right of citizenship to those of African nativity and of African descent, together with the other provisions describing free white persons as entitled to this right and as now finally incorporated in section 2169, is an enlarging and not a restrictive statute, is to lose sight of the fundamental principle of naturalization as understood by the framers of the United States Constitution. The Constitution authorized Congress "to establish an uniform rule of naturalization" (art. I, sec. 8).

It requires affirmative action by Congress to describe those certain persons who might be naturalized, before the right to naturalization accrues. Congress having so expressed itself with reference to a certain class of persons who may be naturalized, by such expression excludes all those who do not come within that classification.

If Congress had passed no statute at all no one would be entitled to naturalization. An applicant for naturalization coming before a court of the United States must clearly show himself to come within a class described by act of Congress before he is entitled to naturalization.

The United States Supreme Court gave expression to this view in *United States vs. Wong Kim Ark*, 169 U. S. 649. At pages 701-2-3 the court said:

"It is true that Chinese persons born in China can not be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes, treaties and decisions upon that subject * * *.

"A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the Naturalization Acts."

Senator Edmunds, at the time of the debate on section 14 of the Act of May 6, 1882 (22 Stats. at L., 58-61), said: "The Constitution provides that Congress may make uniform rules of naturalization so that no person can be admitted to citizenship without affirmative action by Congress. * * * He can not become a citizen until Congress shall affirmatively provide that he may; * * *" (Vol. XIII, part IV, p. 3411-3412, Congressional Record, 47th Congress, First Session.)

The argument of counsel limiting the prohibition of section 2169 to title XXX of the Revised Statutes is highly technical and if sustained would

defeat the clear purposes of Congress as those purposes have been judicially declared by many courts.

Another argument which we respectfully urge would lead to absurd results is that, unless the Act of 1870 extending to those of African nativity or descent and section 2169 are considered as enlarging rather than restrictive legislation, there must have been a period from 1874 to 1875, and until the corrective legislation of 1875, when the only persons entitled to naturalization were those of African nativity or descent. Counsel say at page 16 of their brief in the Ozawa case that such a condition would be "incredible."

The "incredible" condition referred to never existed. Until 1870 the law was that all free whites might be naturalized. In 1870 this privilege was extended to those of African nativity or descent. For the period, then, from 1870 to 1874, free whites and those of African nativity or descent might be naturalized. In 1874, at the time of the approval of the Revised Statutes, and by a mistake of the codifiers thereof, the privilege of naturalization was extended to all aliens. Section 2165 of the Revised Statutes provided that "an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise: * * *."

At the same time the Act of 1870 extending the privilege to those of African nativity or descent was still on the statute books. The language thereof, however, with the law in the condition that it was from 1874 to 1875, was meaningless, for from 1874 to 1875 the privilege was extended to the whole world without any limitations as to race. It was provided that "any alien" might be naturalized. The privilege was not for this year, as claimed by counsel, limited to those of African nativity or descent. It was extended to the world. It was because of this condition which came through an error of the codifiers that the courts admitted certain Chinese to naturalization. Then in 1875, in order to correct this condition, Congress amended section 2169 by restoring to our Naturalization Law the language limiting naturalization to free whites along with those of African nativity or descent, who were in this amendment included in the same section of the Revised Statutes that dealt with the free whites. Congress, therefore, in 1875 restored the law to the exact condition in which it was prior to the approval of the Revised Statutes in 1874. Prior to this approval of 1874 we had the old Act of April 4, 1802, to the effect that "any alien, being a free white person, may be admitted to become a citizen." We also had, from 1870 to 1874, the act granting the same privilege to those of African nativity or descent. In 1874 by error the right was extended to all aliens. In 1875 by amendment to section 2169 the law was restored to the condition as it was prior to the approval of the revision in 1874.

U. S. District Judge Rudkin of the district court of the State of Washington, in *In re Ahkay Kumar Mozumdar*, 207 Fed. 115, gave a succinct expression of the rule that "white persons" must be construed in view of the period of time and changing conditions embraced in the different amendments to section 2169.

At page 117 he says:

"But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only. (*In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Saito* [C. C.], 62 Fed. 126; *In re Camille* [C. C.], 6 Fed. 256; *Matter of San C. Po*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; *In re Buntaro Kumagai* [D. C.], 163 Fed. 922; *In re Knight* [D. C.], 171 Fed. 297; *In re Najour* [C. C.], 174 Fed. 735; *In*

re Halladjian [C. C.], 174 Fed. 834; *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.)"

In re Ellis, 179 Fed. 1002.

In this case the U. S. district court for the District of Oregon held that a Syrian was of the white race and entitled to be naturalized.

Referring to the use of the word "white" in section 2169 of the Revised Statutes as shown by the many amendments to the section always retaining the word "white" and the Congressional debates on said amendments, the court at page 1003 says:

"* * * there is reason for the view, based upon more recent legislation and the debates in Congress pertaining thereto, that the word 'white' was employed to distinguish between the white, the African, and the Mongolian races. (*In re Saito* [C. C.], 62 Fed. 126; *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104.) While it may be true that a statute should be interpreted in the light of the conditions prevalent under which it was enacted, yet the words 'free white persons' are devoid of ambiguity, and are of plain and simple signification."

At page 9 of the brief for petitioner in the *Ozawa* case, counsel cite the case of *U. S. vs. Rodiek*, 162 Fed. 469, to the point that the Act of June 29, 1906, repealed an inconsistent section of a naturalization statute in an Act of April 30, 1900, the latter being the organic act of the Territory of Hawaii.

Examination of this case shows that the inconsistent provision of the Hawaiian act authorized the naturalization of persons who had resided in Hawaii for five years prior to the said act taking effect, without a previous declaration of intention. It was of course properly held that the later act requiring a declaration of intention in all cases except of persons who have served in the Army or Navy repealed the earlier provisions. Also at page 9 of the brief the language of the court from the case of *Bessho vs. United States*, 178 Fed. 245, is cited, to the point that the 1906 Act provided a new and complete system of naturalization. A reading of the decision in the *Bessho* case shows that the court ruled contra to the theory of counsel in this case. It was held that the 1906 Act, since it did not expressly repeal section 2169 of the Revised Statutes, left that section intact so as to limit and control the Act of July 26, 1894 (28 Stats. at Large, 124), authorizing the naturalization of "any alien" twenty-one years or more of age who had served in the United States Navy or Marine Corps, as therein provided. An alien of the Japanese race was held not entitled to naturalization under said Act of 1894, because of the provisions of section 2169.

At pages 9 to 11 of the brief counsel cite similar language to the effect that the 1906 Act provides a complete system of naturalization, from the following cases: *In re Leichtag*, 211 Fed. 681; *In re Mallari*, 239 Fed. 416; *Hampden County vs. Morris*, 207 Mass. 167, 93 N. E. 579; *U. S. vs. Ginsberg*, 243 U. S. 472; *U. S. vs. Ness*, 245 U. S. 319, and *U. S. vs. Peterson*, 182 Fed. 289, 291.

We shall now take these cases up in order.

In re Leichtag, 211 Fed. 681.

This case decides that section 2166 of the Revised Statutes, not having been repealed by the Act of 1906, is still in force and effect. This supports our theory with reference to section 2169.

In re Mallari, 239 Fed. 416.

In this decision the court held that section 30 of the Act of 1906 was adopted for the benefit of citizens of the Philippines and Porto Rico, and that therefore, inasmuch as they are not aliens, section 2169 of the Revised

Statutes, referring specifically to aliens, does not apply to them. It is further held that the Act of July 26, 1894 (28 Statutes 123), admitting to citizenship aliens honorably discharged from the service of the Navy, without requiring the declaration of intention, does not apply to these citizens of the Philippines, because they are not aliens. They, therefore, come under the said section 30 of the 1906 Act, the requirement of which as to declaration of intention and residence must be complied with.

Hampden County vs. Morris, 93 N. E. 579.

This case held that the fixing of fees in the Act of Congress of 1906 would control over a state statute fixing different fees. Of course this must be the rule in order to permit of carrying out the constitutional authorization to Congress to fix a uniform rule of naturalization.

U. S. vs. Ginsberg, 243 U. S. 472.

This case is of no importance so far as the Act of 1906 repealing section 2169 of the Revised Statutes is concerned. It simply holds that final hearings upon petitions for naturalization shall be held entirely in open court. It is, however, of interest to note the following language of the United States Supreme Court in this case at page 474:

"An alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modification; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."

This requirement of affirmative action by Congress to determine who may be naturalized is contra to counsel's theory, which is that section 2169, Revised Statutes, must not be read as prohibiting citizenship to those not free white persons or of African nationality or African descent.

U. S. vs. Ness, 245 U. S. 319.

This case is of no importance so far as the point under discussion is concerned. The court held that the filing of a certificate of arrival, as provided in section 4, subdivision 2 of the 1906 Act, is an essential prerequisite to a valid order of naturalization, and that a certificate of naturalization obtained without the filing of such a certificate of arrival could be set aside in a suit by the United States.

U. S. vs. Peterson, 182 Fed. 289, 291.

This decision held that the requirement of the Act of 1906 that notice of the petition for citizenship must be posted for ninety days prior to the hearing is applicable in the case of an alien applying under the Act of July 26, 1894 (28 Statutes, 124), which provides that service in the Navy or Marine Corps for a specified term and an honorable discharge shall be counted as residence. There is nothing in this case determinative of the point here being discussed. The court held there would appear to be no repugnance between the provisions of the Act of 1894 and those of the Act of 1906.

Counsel in their brief in the Ozawa case make an admission of the unquestioned unanimity of judicial opinion of the proper construction of the expression "free white persons" as contained in our naturalization statutes. They say: "No case has * * * given emphasis in the construction of the section to the words 'free' and 'persons', which are as important to the construction as the word 'white'. Nearly all think the section deals with races." (P. 61.)

The organic act providing for a government for the Territory of Hawaii, approved April 30, 1900 (31 Stat. at L. 141), provided in section 4 thereof:

"That all persons who were citizens of the Republic of Hawaii on August

twelfth, eighteen hundred and ninety-eight, are hereby declared to be citizens of the United States and citizens of the Territory of Hawaii."

The constitution of the Republic of Hawaii (sec. 1, art. 17) provided that "All persons born or naturalized in the Hawaiian Islands and subject to the jurisdiction of the Republic are citizens thereof."

Counsel argue that because some Japanese were thus made citizens of the United States by the annexation of Hawaii a policy of nondiscrimination against the Japanese is shown. As well may it be argued that a similar policy was shown by the United States with reference to the Chinese. Chinese persons who were citizens of the Republic of Hawaii became, by virtue of section 4 of the organic act, citizens of the United States. (23 Op. Atty. Gen. 509; 23 Op. Atty. Gen. 352; 23 Op. Atty. Gen. 345.)

When annexing a new country and bringing its people under the jurisdiction of the United States there are many considerations concerning the interests and rights of its inhabitants which our Government must heed. This is an entirely separate and distinct subject matter and in no way to be taken as indicating a departure from the traditional policy of the United States in dealing with persons who in fact are aliens owing allegiance to a foreign sovereign.

The same considerations were involved in the granting of citizenship to Porto Ricans. In addition it must be noted that the Porto Rican act was approved March 2, 1917 (39 Stat. at L. 965). This was just before the declaration of war by the United States against Germany on April 6, 1917. Military necessity led to the desire that the United States have not only the loyal interest of Porto Ricans but also proper control over them from a military standpoint.

Any naturalizations of Japanese by the courts as referred to by counsel for petitioner were beyond the power of the courts and therefore void.

A. The express prohibition by Congress against Chinese naturalization has been held by the courts to have been unnecessary.

With reference to section 14 of the Act of May 6, 1882 (22 Stats. at L. 58, 61), the congressional debates conclusively show that Congress realized that it was not necessary to express the prohibition of this section against Chinese being naturalized. The section was adopted as an unnecessary result of a very considerable demand for anti-Chinese legislation. It was recognized that the law as then existing did not permit of the naturalization of Chinese and the section was inserted merely to satisfy the extreme demands of those who desired express language in the statutes of a prohibitory character. (Vol XIII, part IV, pp. 3264, 3405, 3411 and 3412, Congressional Record, 47th Congress, First Session.)

The law, as stated by Senator Edmunds during this debate, required no prohibition against the Chinese or any other race. As he very clearly expressed it, no alien was entitled to naturalization unless he came within the affirmative provisions of the act of Congress granting the right to naturalization. The inclusion of section 14 was an unfortunate and equally unnecessary enactment growing out of the particular agitation which then was making its impression upon Congress, and also resulting from a few erroneous decisions admitting Chinese to citizenship.

As Senator Edmunds said, at pages 3411-12, in speaking to his amendment to amend section 14 by striking out all after the word "that" and inserting "nothing in this act shall be construed to change the existing naturalization laws so as to admit Chinese persons to citizenship":

"Mr. President, as this section now stands in the bill, it is the first

time in the history of this nation that Congress has undertaken to make prohibitions against naturalization. The Constitution provides that Congress may make uniform rules of naturalization, so that no person can be admitted to citizenship without affirmative action by Congress. I do not wish for one to have Congress enact any statute which shall prohibit by affirmative declaration any person from becoming a citizen. He can not become a citizen until Congress shall affirmatively provide that he may; and as this section now stands, it is absolutely unique, probably not only in the history of this country but of every other, and so I move this change so as to leave the law just as it is now in order to avoid what hereafter will be a very unhappy precedent, I am afraid, for a good many people."

Counsel at pages 19 and following of the brief in the Ozawa case argue that because of express statutory prohibitions against Chinese immigration, and the absence of such legislation as against Japanese immigration, the policy of Congress has not been to prohibit Japanese immigration.

Reference is also made to the language of President Roosevelt in his annual message to Congress at the session opening December 5, 1905, wherein he refers in general terms to the policy of admitting as immigrants any that are fit for citizenship. In a characteristic portion of this address the President said that we can not afford to consider whether an immigrant "is Catholic or Protestant, Jew or Gentile; whether he is Englishman or Irishman, Frenchman or German, Japanese, Italian, Scandinavian, Slav or Magyar." It is perfectly obvious that the President was here referring to immigration and not to naturalization. It is also common knowledge that even as to immigration the celebrated "gentlemen's agreement" negotiated with Japan by President Roosevelt was at least intended to solve the problem of immigration.

The United States Government has consistently recognized the Japanese problem, just as it has the Chinese problem. It may be that because of a punctilious regard for a people inclined to be over-sensitive, our federal officials have gained their purposes with reference to the Japanese in a more indirect way than has been the case in dealing with the Chinese. It may indeed be that the more direct method would have been in the long run the more satisfactory solution. But in any event President Roosevelt, in using the language above quoted, did not intend to suggest that Japanese are entitled to naturalization.

Neither the President nor the Congress could change the rule limiting naturalization rights to those of the white race and of African nativity or descent, except by amending or repealing section 2169 of the Revised Statutes. We have but to suggest an attempt to so repeal this statute, to realize the overwhelming protest that would prevent any such action by Congress.

It would seem to have been the part of wisdom and statesmanship during the years of rather strained diplomatic relations between this country and Japan for our President to insist that the law be left as it is, rather than to place upon the statute books an unnecessary express prohibition against Japanese naturalization.

It would also seem to us to be a most unfortunate situation if the theories of counsel should prevail so as to necessitate such prohibitory congressional action.

That such legislation would result if such a situation were created is inevitable.

Counsel quote at pages 25 and 26 of their brief in the Ozawa case language by United States District Judge Morrow, *In re Gee Hop*, 71 Fed. at pages 274 and 275. The only thing decided in this case was that a Chinaman was not entitled to be naturalized. Counsel would seem to draw the conclusion from the language quoted that Judge Morrow intended to say that the Chinese are the only people that belong to the Mongolian race. The mere statement of such a proposition would seem, we respectfully submit, to be sufficient answer to the claim that Judge Morrow ever held such an opinion.

We submit that portion of counsel's brief, pages 27 to 32, dealing with the Immigration Act of Congress of February 5, 1917, as a very good premise for a conclusion opposite to that drawn by counsel for petitioner. It shows that the Japanese themselves, in their objection to having the prohibition of immigration extended to those ineligible to citizenship in the United States, realize, as of course Congress realized, that they were ineligible to citizenship.

This was simply another case of a cautious Congress, and statesmanship, which under all the circumstances may have been a wise statesmanship, yielding to a sensitive people who prefer that their status with reference to immigration and naturalization remain as it has been for years. This, rather than an unnecessary affront perpetrated by the American Government. To argue from this that Congress intended to recognize the Japanese as eligible to citizenship seems to us a most unreasonable interpretation of the debates and of all contemporary history.

The supreme court of Washington in *In re Yamashita*, 70 Pac. at page 482, refuses to follow the argument of counsel to the effect that the expressed exclusion by act of Congress of Chinese from the rights of naturalization implies a right in the Japanese to be naturalized. (See, also, *Bessho vs. U. S.*, 178 Fed. 245, *supra*.)

In *In re Po*, 28 N. Y. Sup. 383, the city court of Albany, New York, stated at page 384 that the Act of Congress of 1882 denying citizenship to Chinese "seems to have been an unnecessary enactment, simply declaratory of the existing conditions, * * *."

This court also decided, in the said case, that the Burmese, being of the Mongolian race, were not entitled to naturalization.

The same rule as to the proper construction of the Act of 1882 is expressed in *In re Kanaka Nian*, decided by the supreme court of Utah, vol. 21 Pac. p. 993.

Counsel for petitioners in the Yamashita case, at page 4 of their brief, cite *In re Ah Yup*, 5 Sawy. 155, Fed Cas. No. 104, as authority for the point that during the interim between December 31, 1873, and February 18, 1875, when through inadvertence the expression "white persons" was omitted from the naturalization statute, it was held by the courts that Chinese were eligible to citizenship. While such was the law, this citation of the Ah Yup case is erroneous. It was decided in 1878 and as authority for the point that at that time and prior to the statutory prohibition against naturalization of Chinese as contained in the Act of 1882 Chinese were not eligible to citizenship.

The same error is made by the court in its citation to *In re Ah Yup* as authority for this point in the case of *In re Ah Chong*, 2 Fed. 733, at p. 739, and which case of *In re Ah Chong* is also cited by counsel at page 4 of their brief.

III.

THE SCIENTIFIC QUESTION OF THE RACE OF THE JAPANESE PEOPLE. BY THE OVERWHELMING WEIGHT OF RECOGNIZED ETHNOLOGICAL AND ANTHROPOLOGICAL AUTHORITY, THE JAPANESE ARE OF THE MONGOLIAN-MALAY, OR "YELLOW-BROWN", RACE.

At the end of the eighteenth century the German scientist Blumenbach, the first great ethnologist, published a treatise which was translated into English at the beginning of the nineteenth century. In this work Blumenbach divided the human race into five great classes:

The white or Caucasian; the black or Ethiopian; the yellow or Mongolian; the brown or Malay; the red or Indian.

This classification of the human race has persisted throughout different scientific writings and particularly in popular usage, to the present day.

There have been certain modifications made by some of the later scientific authorities. The most recent and best recognized variation reduces the classification to three divisions, by eliminating the brown and red races as distinct branches, and combining these two with the Mongolian in a division generally referred to as Mongolian-Malay, or yellow-brown. It is to this division that the overwhelming weight of authority assigns the Japanese race.

There was a hearing before the committee on the territories, House of Representatives, held on July 17, 1922, and regarding anthropological and historical data affecting nonassimilability of Japanese in the Territory of Hawaii and the United States.

These proceedings have been printed in pamphlet form by the Government Printing Office and they include testimony given by Dr. Ales Hrdlicka, curator of the division of physical anthropology, National Museum, Smithsonian Institute. Dr. Ales Hrdlicka is probably the best known and ablest anthropologist in the United States, and therefore the best qualified to testify on the question of the race of the Japanese. He was asked at page 11 of these printed proceedings, "Are the Japanese in any way descended from the Aryans?" His answer at page 12 is as follows:

"In no way whatsoever. No Aryans, so far as known, ever reached even so far as the more eastern part of central Asia. They extended from about 1200 B. C. onward from or through the regions now comprised in southern Russia into Medea, Persia, and India. There are no traces that they ever reached in any numbers even as far as what is now known as the Chinese Turkestan, and no trace exists of their ever having penetrated farther east. The Japanese, according to all indications, had already reached the Japanese Islands before the first movement of the Aryans from Europe took place."

Dr. Ales Hrdlicka's testimony is given at pages 2 and following of this pamphlet. It is a most scientific analysis of the racial characteristics of the Japanese people and is as convincing a document as we have examined to show that the Japanese are of the yellow-brown race. We particularly recommend to the court the reading of this testimony. It is too long to give in full in this brief, but we shall quote extensively therefrom. In addition to this testimony, we also respectfully suggest to the court that the pamphlet contains as complete a digest from the ethnological and anthropological authorities on this subject matter as we have seen.

At page 12 of this document is given a quotation from "Who's Who in America," 1920-21, giving a biography of Dr. Ales Hrdlicka, which shows the very great learning and high scholastic standing of this authority.

Following is a quotation from the testimony of Dr. Ales Hrdlicka:

"The Chairman. Are the Japanese people a distinct race of people, a race distinct and apart from the rest of mankind?"

"Doctor Hrdlicka. The Japanese people are not a distinct race. They may be called a distinct group, but they are merely a part of the yellow-brown people or race.

"The Chairman. Are the Japanese people a legitimate part of the yellow race?"

"Doctor Hrdlicka. The Japanese people are an inherent part of the yellow-brown race.

"The Chairman. Would it be at all possible to regard the Japanese race as a white race, or a Japanese as a white person?"

"Doctor Hrdlicka. None of the reliable scientific men of Japan itself nor those of anywhere else have ever attempted to make any such classification; they all, without exception, class the Japanese as yellow-brown or Mongoloid people.

"The Chairman. Please give the reasons for such classification.

"Doctor Hrdlicka. In the classification of the human races the main criteria are the physical characteristics of peoples, which are, of course, the essential characteristics. We are guided by a large number of features, both of the living as well as of the body remains, and where it is found that a majority of the features that are important agree in two or more ethnic groups, we are naturally obliged to class those groups into one strain or stock, or one variety, or one race—all of these terms being interchangeable and used for each other.

"In the case of the yellow-brown people we find that all of them, including the Japanese, are characterized by a color range of skin which ranges from tawny to dark brown and we therefore call them yellow-browns. We find, in the next place, that all these people are characterized by black and straight hair. This hair, moreover, under the microscope on a cross section, shows a roundish outline, while the outline of the hair of the white man is, on the average, oval, and that of the hair of the black is flattened. In the third place, we find that all the yellow-brown peoples, the Japanese included, show a scarcity of hair on the body and also a sparse and shorter mustache and beard, which even in the cases where it is best developed does not come up to the average of the white man. In the fourth place, we find that the yellow-brown people, and the Japanese especially, are characterized in a large majority of cases by more or less peculiar eyelids, the peculiarity consisting in a fold from the upper eyelid over the inner corner of the eye on each side, a fold known as the epicanthus. This condition is found in white people and negroes only very exceptionally, and then only in the young.

"In the yellow-brown peoples it is more or less common, according to the group, even in adults. It is particularly prevalent in the Japanese and the Chinese. This is a condition which gives rise to the term 'oblique' or 'Mongolian' eye. As a matter of fact, the eye is not oblique, but on account of the peculiar formation of the upper eyelid the slit between the two lids becomes more or less oblique, the outer corners being higher than the inner. The whole constitutes one of the most obvious of the so-called Mongoloid characteristics, and, together with the color of the skin and characteristics of the hair, is quite sufficient to entirely differentiate the peoples possessing them from the whites and placing them among the 'Mongoloids' or yellow-browns. In the fifth place, we have a remarkable feature which is common to a large percentage, or to from 50 to 80 per cent, of the yellow-brown

peoples, and which is rare among white peoples and also black peoples, amounting to only a few per cent in either—and that is a peculiar hollow nature of the buccal surface of the upper incisor teeth, and particularly the medians. This condition of the teeth I described in the *American Journal of Physical Anthropology*, which may be referred to for the details. (Hrdlicka [Ales]: Shovel-shaped teeth. *Am. J. Phys. Anthropol.*, 1920, vol. III, No. 4, pp. 429-466.)

"In the sixth place, the Japanese and all the other members of the yellow-brown race differ from the whites, and also from the blacks, but especially from the whites, in the various features of their face. Their face is flatter, the lips, due to a slightly greater prognathism, are frequently somewhat fuller; the nose, especially in the Japanese, is commonly smaller and of a different contour, the glabella region (the region above the root of the nose) is flatter, as compared with the averages in the white race. Naturally these features do not hold equally good for all the branches of the large yellow-brown race, such as some of our Indians.

"The Japanese and other yellow-brown peoples differ also from the white people in various other physical characteristics, and apparently they also differ from them more or less mentally. These more detailed, and especially the psychological, features are difficult to define without technical language, or with finality, many of them being still under investigation.

"The Chairman. But they do exist?

"Doctor Hrdlicka. There are indications to that effect.

"The Chairman. Can you therefore state positively that the Japanese are not white people?

"Doctor Hrdlicka. There can hardly be anything in anthropology more positive than the fact that, on the whole, the Japanese are yellow-brown, or Asiatic, or 'Mongoloids'; though the Japanese, just like the Chinese, the Koreans, and all other branches of the yellow-brown people, like the larger groups of our own race, contain some foreign admixture. * * *

"The Japanese have in their veins—just as the Chinese have, just as doubtless the Koreans have, or the Mongolians, or Siberian Tartars have—some blood that may be called white, but the quantity of this, on the whole, is so small that, except in a few families, it is wholly imperceptible, and, of course, cannot change the racial status of the people.

"The Chairman. What proportion of white blood would you say was in the modern Japanese race?

"Doctor Hrdlicka. The proportion of white blood differs according to classes and according to districts. In by far the larger part of Japan, where the contacts have been nil or very small between the two races, the mixture is practically nil; in the port cities it may amount, at the most liberal estimate, to perhaps something like 5 per cent; in individual families it may, of course, be as high as 50 per cent.

"The Chairman. Taking the Japanese race as a whole, what would the white blood average, in your opinion?

"Doctor Hrdlicka. Not more than, say, that of the negro blood among the Mediterranean whites. In a large part of Japan there has been no contact whatever with whites and the people are not admixed. In places like the general districts of Tokio, Yokohama, Kobe, Shimonoseki, and the Kurile Islands, white people have had more access and there is some mixture. A trace of white blood remains probably in some of the Japanese as a result of their old admixture with the Ainu, but this must be small, for the number of thus incorporated Ainu was, according to all accounts, not a large one.

"The Chairman. Did the Ainu people originally occupy all the islands of Japan?

"Doctor Hrdlicka. With the remnants of the preceding people they occupied, according to evidence so far unearthed, all of the islands, but in a sparse way.

"Mr. Swing. How many would you estimate?

"Doctor Hrdlicka. I would not tell you that; but at most probably not over a few tens of thousands. Their remains, while widely spread, are not abundant.

"The Chairman. As I understand, there are about 2000 left?

"Doctor Hrdlicka. There are only a few hundred left of pure blood. Personally I think there are not over 200 or 300 pure bloods left, and even that may be too great an estimate.

* * * * *

"The Chairman. Could the Ainu be possibly regarded as whites?

"Doctor Hrdlicka. No; but they are probably partly whites and partly yellow-brown. * * * One or two wanted to make a new race out of them; one or two proposed to regard them as white, and some consider them simply yellow-brown with aberrant characteristics. However, I think the best scientific opinion today would be that they are merely an ancient mixture of the two yellow-browns and some old whites, both of which to some extent are manifested in their present-day appearance.

"The Chairman. But they are not white people?

"Doctor Hrdlicka. They are certainly not white people.

"The Chairman. And could not be classed as free white people?

"Doctor Hrdlicka. Not without doing violence to the facts. Their most serious students, such as Koganei, Torii, Torok, have never attempted such a classification.

"The Chairman. Have you studied the Ainus as a scientist from skeletal remains, books, etc.?

"Doctor Hrdlicka. Yes, sir.

"The Chairman. Would you say that they are Caucasian or Mongolians?

"Doctor Hrdlicka. I should say they are intermediate people, a result of ancient mixture of the two.

"The Chairman. What would the preponderance of blood be?

"Doctor Hrdlicka. That is hard to say; but possibly somewhere near half-and-half.

"The Chairman. Would you classify them as part of the white race or of the yellow race?

"Doctor Hrdlicka. They are neither pure whites nor pure yellow-brown, and should not be classified with either race.

"The Chairman. They are like the mulattoes in this country?

"Doctor Hrdlicka. Yes, sir; they are intermediates.

* * * * *

"The Chairman. What percentage of the Ainu blood would you say appears in the Japanese of today?

"Doctor Hrdlicka. That is impossible to say; but it is not large.

"The Chairman. Is it an appreciable amount?

"Doctor Hrdlicka. It is not plain, and many Japanese have probably no such blood. Some might say there was Ainu blood in those Japanese who have larger beards for there are occasionally Japanese who are fairly well bearded; but even in these cases the beard shows the essential characteristics of the yellow-brown man, and it is doubtful if it has been influenced by any Ainu mixture.

"The Chairman. But even of these the percentage is small?

"Doctor Hrdlicka. The percentage is certainly in the minority.

"The Chairman. There would not be over 1, 2, or 3 per cent of the Ainu blood in the Japanese at the present time?

"Doctor Hrdlicka. I do not see how there could be any more, if that much.

"The Chairman. It would not change the Japanese people in any regard or in any number from Mongolians or yellow-brown to white?

"Doctor Hrdlicka. No, sir. It would no more change the Japanese than a similar admixture, for instance, changes the Mongolians proper, or the Chinese, or the Malays, all of whom have some admixture of white blood.

* * * * *

"The Chairman. Please tell us something regarding your observations of the skin of the Japanese and of their color.

"Doctor Hrdlicka. The Japanese range from yellowish white to dark brown. The predominant shades are tawny to medium brown.

"The Chairman. What Japanese scientific authorities can you name that consider the Japanese people as belonging to the Mongoloid or yellow-brown race?

"Doctor Hrdlicka. I would say, in a word, all of those who have been occupied in Japan in a really scientific way with the anthropology of their people. Those that I may name offhand are Koganei, Tsuboi, Torii, Kaneka, Ogura, Matsomoto, Adachi. The statements of these authorities are not always direct, but they are all to the same end and purpose. No reputable man of science in Japan has ever claimed that as a group the Japanese were anything else than yellow-brown or 'Mongolian.'

* * * * *

"Doctor Hrdlicka. The most important craniological differences between the three different races are essentially those of the face. In the yellow-brown peoples, as contrasted with whites, we find that the face is, on the whole, more flat; that the malar bones are, in general, larger and more protruding; that the region above the eyes, and especially above the region of the nose, is characteristically flatter—which is especially the case among the Chinese and Japanese; the nasal aperture in the yellow-brown races, except those in the northernmost regions (Eskimo), is generally wider than it is in the whites; and the protrusion of the upper dental arch forward (alveolar prognathism) is on the average somewhat greater in the yellow-browns than in the whites. In addition there are many differences between the skeletal remains of the two races, but these become apparent only in studies of large series of specimens. And there are certain anomalies, such as, for instance, the *os japonicum*, which are more frequent in one race than in the other. * * *

"Doctor Hrdlicka. There has been but very slight admixture of that nature, considering the number of Japanese. The Japanese have for a long time excluded the whites, and they had also the isolation afforded by great distance.

"The Chairman. They prohibited immigration of other races into Japan, and they had not intercourse with the outside world, outside of Korea and China, for many hundreds of years, until it was opened up by Perry in 1856?

"Doctor Hrdlicka. Yes.

"The Chairman. For a thousand and more years before Perry's coming there was no appreciable admixture of blood with whites on account of the isolation of their country and their prohibition of immigration?

"Doctor Hrdlicka. Yes, sir. During two thousand years and over they were mixing only with the people of Korea and China.

"The Chairman. You mentioned the lack of hair on the face of yellow-brown people. Is there any noticeable lack of hair on other parts of the body?

"Doctor Hrdlicka. Yes, sir. I mentioned that also, I believe. There is a general scarcity of hair in the yellow-brown people on the body. There is hair on the pubis, but it is not as profuse as in the people of the white races.

"The Chairman. Doctor, do you believe that the assimilation of the Japanese is possible in this country by the process of intermarriage?

"Doctor Hrdlicka. In answer to that I may only say this: It is not impossible, but evidence shows that a Japanese assimilates with considerable difficulty; he learns the language with difficulty; his mentality appears to be somewhat different; he is not what one would call a 'good mixer.' This is observable to some extent even in Asia among the people with whom he is closely related.

* * * * *

"The Chairman. Neither the Filipinos, the Malays, the Chinese, the Koreans, nor the Japanese, nor the Mongols, nor the Siberian tribes, can be classed as whites?

"Doctor Hrdlicka. No.

"The Chairman. They all belong to the yellow-brown race?

"Doctor Hrdlicka. They all belong to the yellow-brown or Mongoloid race.

"The Chairman. Why is the race called 'Mongoloid,' Doctor?

"Doctor Hrdlicka. It is called 'Mongoloid' because of the great prominence that the Mongols assumed in the Old World by their invasions of eastern and central Europe and Asia Minor, particularly in the thirteenth century.

"The Chairman. That is the reason they are called a Mongoloid race?

"Doctor Hrdlicka. Yes. The Mongols having made such an impression upon the white people of Europe, subsequently all Asiatic peoples showing their physical characteristics were called Mongoloid peoples. That is how the term 'Mongoloid' race came about. It does not mean 'derived from Mongols'; Mongols are but one of the larger groups of the great yellow-brown people.

"The Chairman. The term 'Mongolian' was applied to all of the yellow-brown people?

"Doctor Hrdlicka. To all of the yellow-brown people, yes; except that originally the Malays and the American Indians were kept separate, until they were sufficiently studied and shown to possess the same basic characteristics, and to have come from somewhere in eastern Asia."

Prof. Yoshi S. Kuno, ethnologist and acting head of the department of oriental languages and literature at the University of California, Berkeley, California, has recently written a most scholarly and interesting article on "The Racial Origin of the Japanese." Prof. Kuno is a Japanese. At the time of writing this brief this article has not yet been published. We, however, have had the advantage of reading an advance copy thereof and shall now quote therefrom with the assurance that it is as scholarly and instructive an article as we have read on this subject. It will be noted with what positiveness Prof. Kuno rejects the theories of those who without any scientific basis have urged that the Japanese are of the Caucasian race. Prof. Kuno after discussing Japanese mythology and referring to the Tenson race, one of the primitive races of Japan, continues as follows:

"Modern historians believe that this race came from the South Sea

Islands, or from Malay, or from India. From the foregoing myth, we can readily see that there is some resemblance between Japanese mythology and that of the Greeks and that of India. Besides this Tenson race, another race came from a foreign country. This race probably came from Mongolia through Korea and landed on the west coast of Japan in the Province of Izumo in Honshu. This race is known as the Izumo race. At any rate the Tenson race and Izumo race amalgamated and formed the modern Japanese race. Therefore the Japanese are fully agreed that the modern Japanese are not the aborigines of Japan, but that they were immigrants from foreign countries. When these races landed in Japan, they found the country inhabited by numerous tribes, among which the Ainu and the Kumaso were the most powerful. The Ainu race occupied Sakhalin, Yezo, and most of the Island of Honshu. The Kumaso race controlled almost the entire Island of Kyushu, and also exercised some control in Shikoku. The Tenson race remained in a small district in the south end of Kyushu Island for three generations. * * * The Ainu, though still persisting at the present time in the northern part of the Island of Yezo, however, like the American Indian, are a dying race. The Japanese Government looks after the Ainu just as the American Government looks after the American Indian. It gives them every possible protection, yet their numbers are steadily decreasing. At the present time the total number of Ainus who live in Japan scarcely reaches 15,000. They are at present like the American Indian, rather mild and spiritless, and possessed by a strong desire for liquor. Above all, they are noted for being dirty. The habit of bathing is not only entirely unknown among them, but it never even occurs to them to wash their hands and faces. Dr. Batchelor, who is a sympathetic friend of the Ainu as well as a prominent American scholar, has made the study of the Ainu race his life work. He states in his book that on one occasion he lived with an Ainu family for a month and one-half, while on another occasion he stayed with another Ainu family for two months. During all this time he never saw the Ainu either washing themselves or their cooking or eating utensils. * * * The Ainus leave no traces of ever having possessed the art of writing or having had any art work. Yet such prominent so-called Oriental scholars as Batchelor and Griffis believe that the Ainus are a branch of the Caucasian race. More recent investigation by modern scholars proves that the Ainu came from Siberia and crossed the narrow strip of water between the continent and Sakhalin, spreading thence to Yezo and Honshu. No matter whether the Ainu are of Caucasian or Asiatic origin, it has no particular bearing upon the racial origin of the modern Japanese, because there is no resemblance between the modern Japanese race and the Ainu who are still living in Yezo and Sakhalin.

* * * * *

"Inhabitants of the Japanese Empire of the present day comprise besides about 100,000 Formosan barbarians, whose ancestors undoubtedly came from Malay, 3,000,000 Chinese in Formosa who were naturalized after the China-Japan war, and 17,000,000 Koreans in Korea who became Japanese subjects after 1910. The remainder of the people numbering about 55,000,000 belong to the modern Japanese race. * * *

"The origin of the modern Japanese race is a most puzzling question. Most historians agree that, as was stated in the preceding part of this article, the Japanese are an amalgamation of the Tenson and the Izumo races. However, the various scholars maintain different opinions regarding the origin of the race. From Japanese mythology and tradition, some historians have advanced the theories of Greek and Egyptian origin, while

others have demonstrated to their own satisfaction that the Japanese originally came from Babylonian or African stock. Though up to the present time different historians have thus presented various theories, yet they have been unable to furnish any conclusive evidence in support of those opinions. All historians are, however, agreed that the modern Japanese are one of the most greatly mixed races in the world. The main branches of the Japanese race are generally believed to be Mongolian element that started from Mongolia, passed through Manchuria and Korea, and finally entered Japan. The other main stream of immigrants is believed to come either from Malay or the South Sea Islands. These probably either followed the ocean currents or were carried by the storm. They pursued a northeasterly course, touching at Canton and Formosa, and finally reaching the southeastern part of the Kyushu Islands. Those who have visited the southeastern part of the Kyushu Islands and the Izumo district have found there abundant evidence to prove the landing there of these immigrants. Furthermore there is great similarity between the traditions of the early Koreans and Japanese. Therefore such prominent historians as Dr. Kume insist that the Japanese, the people in the southern part of China and in Korea must be of the same race. However, the race that came from the south and the race that came from the continent may even today be traced through the physical characteristics of the Japanese people. One traveling through Japan soon discovers that there are two prevailing types of faces among the Japanese. One is oval and the other round. The oval face is most commonly found among the high class of Japanese. The skin of these people ranges in color from a yellowish brown to a cream white. Most of the people with the oval faces have small faces and narrow, oblique eyes, with slightly Roman noses. This type probably represents the people who came from the Korean stream. Those with round faces have dark skin, prominent cheek bones, large mouths and rather round eyes, with short, flat noses. This round face people must be of Malay or South Sea origin. They are usually found among the lower or farmer class in Japan today.

"However, no matter what proportion the Korean and Malay or South Sea or Indian blood may have been in the original Japanese race, or no matter what proportion of other racial elements has been mixed with the Japanese blood, it is undeniable that in the veins of the present Japanese race, Chinese and Korean blood prevails. After the Japanese Government had been fully organized, wave after wave of immigrants poured almost incessantly into Japan from both China and Korea. In ancient times Korea was divided into many small kingdoms which were constantly at war with each other. Also throughout the history of China, numerous national disturbances that brought about a change of dynasty frequently took place. Therefore those defeated ruling families in China and in Korea together with their followers and sympathizers generally escaped to Japan and established new homes. They took Japan as their new home for two reasons. First, it was the custom in those days for the conquering dynasty to seek to destroy all members of the preceding ruling family and their supporters. Second, Japan was then in a very primitive stage of civilization when compared with China or Korea. Therefore the Chinese and Koreans who established themselves in Japan were not only able to dwell there in safety, but they became leaders in intellectual and industrial work in Japan. They were even appointed to prominent government positions. The Chinese and Koreans not only escaped to Japan in order to save their lives, but even in time of peace, Japan often invited Chinese or Koreans skilled in certain lines of industry to come to live in Japan. Japanese history records that

about the third century A. D. the Japanese Government invited Chinese whose homes were in the Wu district near the present city of Shanghai to introduce the art of weaving and the manufacture of dry goods. Therefore even today all dry goods are known in Japan as 'Wu goods,' which means the sort of goods introduced from the Wu district in China. In the fourth and fifth centuries most of the prominent officers who undertook intellectual and literary work were either Chinese or Koreans or their descendants whose ancestors had emigrated to Japan. In the middle of the fifth century, when an industrial census was taken, a family called Hata, together with its branch families who had originally emigrated from China to Korea in the fourth century, and who then came to Japan, numbered 18,670 heads of families. They claimed that they were the direct descendants of Hsi Hwang Ti, the Emperor who completed the great wall of China. This family introduced silk culture technically known as sericulture. The Japanese Government requested these people to supervise the silk production and manufacture in all parts of Japan. For many centuries after taking up this work this family was both financially and politically the dominant power in Japan as late as the ninth century. Even today the Hata family is prosperous, and has branches in many different districts in Japan. Originally, this family came to Japan about the third century, bringing the entire population from 127 districts. In much the same way about the fourth century the descendants of the Han Emperor came to Japan bringing with them the entire population of 17 districts. Of course they came from China through Korea. Countless Chinese and Koreans immigrated to Japan and established themselves there in intellectual and industrial undertakings, such as ship building, medicine, pictorial art, music, lacquer work, and the art of irrigation. In 665 and 669 so many Koreans immigrated to Japan that the Government allotted to them the Province of Omi for their place of residence. In 666 several thousand Koreans came to Japan. The Government allotted to them the Province of Musashi. Thus for many centuries a county called Korea existed in Japan. In 797 the Ainu made a final stand against the Japanese. At that time the Emperor appointed a man who was a direct descendant of a Chinese ruler as commander of the entire army. Owing to his wonderful genius and ability, the Ainu were finally driven from the Island of Honshu. After his death the Japanese built a most magnificent tomb, known as 'The Tomb of the Commander-in-Chief.' Whenever any important national event took place, the Japanese used to go to worship at this tomb, beseeching the spirit to protect the nation. From the thirteenth to the fifteenth centuries, one of the most powerful military families, called Ouchi, practically controlled the most important part of Honshu Island. This family were descendants of a Korean king. In 815 an official census was taken of the prominent families that lived in the five provinces surrounding Kyoto, then the capital of the Empire. The result of this census, which was published in a book that is still extant today, shows 1180 distinguished families. Of this number, 360 were the descendants of the Japanese Imperial family, 450 were families the ancestors of which had come to Japan with the Imperial family at the time of the foundation of the Empire, 370 were noble families whose ancestors had come from China or Korea. From these statistics it may be estimated that in the ninth century, about one-third of the ruling families were descendants either of Chinese or Koreans. It is also an undeniable historical fact that notwithstanding the fact the Japanese lay great stress upon the sacredness and purity of the blood of the Imperial family, still Korean blood has been infused into it through the mothers. In order to maintain the purity and sacredness of the Imperial blood, it

was a long-established tradition in Japan that the Emperor should marry no princess but one of the Imperial blood. Notwithstanding that this custom was jealously and strictly adhered to, prior to the ninth century, four Emperors took Empresses who had Korean blood. For instance, the Emperor Ojin, who ruled Japan about the beginning of the third century, and who is even today worshipped as the god of war, was born to an Imperial princess who was the direct descendant of a Korean princess. The Emperor Kammu, who is second in fame among the Emperors of Japan, and who was the founder of the capital at Kyoto, was born to a woman who was a direct descendant of the King of Korea.

"In this way both the higher and lower classes of Chinese and Koreans immigrated to Japan as late as the ninth century. Such being the case, intermarriage between Japanese and the Chinese and Korean immigrants became very common in all ranks. Therefore no matter from what stock the Tenson race and the Izumo race may have come in the beginning, at the present time it is an undeniable fact that there is a strong infusion of Mongolian blood mixed with that of all classes of Japanese. Therefore the modern Japanese should feel just as proud as the Chinese and the Koreans of the fact that they belong to the Mongolian race.

"From a social and from a historical standpoint, if one discusses the origin of the modern Japanese race, it is right to compare it to the origin of many nations in South America. No matter what sort of races such as the Incas and many other early races that inhabited South America may have been, the present population of South America may be looked upon as descendants of the Spanish and the Portuguese. Furthermore, their civilization is nothing but the Latin civilization transplanted. The same thing holds true of Japan. The present Japanese population is composed largely of descendants of Chinese and Koreans. The so-called pure Japanese civilization was really established by introducing Chinese and Korean civilization into Japan. Notwithstanding that such is the case historically, certain Japanese who live in the United States for personal or business reasons have brought cases before United States courts asking the right of naturalization, basing their plea upon the fact that the Japanese belong to the Caucasian race. If such Japanese had either a little historical knowledge of their own country or a little conscience, they would be ashamed. At the same time they should know that the Japanese in Japan greet both Chinese and Koreans with the words, 'We belong to the same race and are people who use the same characters.' However, after the ninth century, Japan practically remained secluded within her own limits for a period of about 1000 years. During this long era of seclusion, with the exception of a period of about 100 years from the middle of the 16th to the middle of the 17th century, during which time the Japanese came into contact with Occidental civilization through the Portuguese and Spanish, the various races that had taken root in Japan lived together in seclusion, and became amalgamated into what is now known as the Japanese race. They worshipped the Imperial ancestor as the supreme God of the land, and the ruling Emperor as the representative of that God. Because the people thus became so intermingled, their original differences in race, manners and characteristics were entirely fused. Out of this melting pot emerged the modern Japanese race, which is entirely unlike any other race on the face of the globe. It is also the most homogeneous race in the world, being bound together by bonds of theal unity, patriotism and national pride. Therefore the Japanese are Japanese, as distinct from the rest of the world. However, if one would like

to know to which race the Japanese belong, it is safe to say that the Japanese belong to the Mongolian race.

"In concluding this rather interesting and important subject, I would like to quote two statements of two of the foremost scholars in Japan, both of whom are recognized as authorities on this subject. Dr. Fujioka states in volume I of his *History of Japanese Customs and Traditions*: * * *.

"As to the race which is supposed to have descended from Heaven, among prominent scholars we find two trustworthy opinions. One is that they were originally of the Mongolian race, and from Mongolia they went to Manchuria and then proceeded southwest. From there they went to the northeastern part of China. Then they entered Korea and finally they reached the southern part of Japan. The other opinion is that those races were originally Malayan. They were carried either by the current or the storms in a northeasterly direction. Then passing along the coast of Formosa, they finally reached Kyushu Island. I can not say which opinion is correct. However, it may be right to say that the modern Japanese race is a mixture of the Mongolian and the Malay races. But some Japanese scholars state the original Japanese came from Polynesia in the South Sea. From there they came to Japan. Other scholars who hold radical views say that the Japanese are a branch of the Babylonian people who were scattered all over the world after the fall of Babylon. Others say that the Japanese are nothing but Jews who were scattered all over the world, some of whom reached Japan. These opinions are entirely groundless and are not worthy of attention. * * *

"Dr. Kume is the foremost scholar on the subject of the racial origin of the Japanese. In his *Ancient History of Japan*, volume I, he writes: * * * In my opinion, the modern Japanese must have come from the Asiatic continent. In the primitive period of history, China, Korea and Japan existed. In those periods, water separated those countries, but it was very shallow and was bridged by numerous small islands. Therefore the continental people immigrated to Japan from one island to another. This opinion can be verified by many ancient articles which have been handed down to the present generation. We often excavate stone arrows and copper vessels near the present city of Kyoto. The same things are today found in Manchuria, particularly near the Amur River. Japan has a particular kind of jewel which has been handed down from the ancients; and often we excavate coffins made of chinaware. These are believed to have come from the southern part of China. The Japanese race is generally divided into the North Race and the South Race. By recent investigation we find that the so-called North Race came from Sakhalin and Yezo Island and went down toward the south. The other race probably came from the South Sea Islands and proceeded eastward. These two races came into collision and were finally amalgamated. This fact can be verified by the physique, the bones, the customs and the manners of the Japanese of the present time. In a word, we may say that both of these races originally came from China and the Korean peninsula.'"

Senate Document No. 662, vol. 9 of the 61st Congress, third session, 1910-1911, is a "Dictionary of Races or Peoples," included within the reports of the immigration commission.

From this very scientifically prepared report we shall quote several definitions of different races or peoples.

"*Caucasian, Caucasie, European, Eurafrian, or White Race.* (See Xanthochroi and Melanochroi races, p. 31.) The name given by Blumenbach in 1795 to the white race or grand division of mankind as dis-

tinguished from the Ethiopian, Mongolian, American, and Malay races (see these). The term is now defined more suitably for our purposes in a broader sense by Brinton and Keane, namely, to include all races, which, although dark in color or aberrant in other directions, are, when considered from all points of view, felt to be more like the white race than like any of the four other races just mentioned." (Senate Document No. 662, p. 30.)

"Aryan, Indo-European, Indo-Germanic, Indo-Celtic, Celto-Germanic, Japhetic, or Sanscritic.

* * * * *

"It will be seen that the words 'Aryan,' 'Indo-European,' and the like are linguistic rather than ethnological. Yet there has been much written, especially among the earlier philologists, about an 'Aryan race.'" (Senate Document No. 662, p. 17.)

"Mongolian, Mongol, Mongolic, Mongoloid, Asiatic, or yellow race. That grand division of mankind which is typically, as to color, and present habitat, Asiatic.

* * * * *

"Brinton divides the Mongolian race into two great branches, the Sinitic and Sibiric. The former is the more populous, and is confined to Asia, being subdivided into the Chinese, Indo-Chinese, and Tibetan groups. The Sibiric branch includes all the invaders into Europe above mentioned, who are therefore more closely related linguistically to the Japanese than to the Chinese. This branch includes, besides the Japanese, Arctic, and Tungusic groups, the Finnic, Tartaric, and Mongolic. It is the three last-named groups that are represented in Europe; the Finnic by the Finns, Lapps, Esths, Livs, Mordvinians, and others of Russia, and the Magyars of Hungary; the Tartaric group by the Kirghiz-Kazaks, Turkomans, and kindred tribes in Russia, and the Osmanlis or Turks of Turkey; and the Mongolic group by the Kalmuks of eastern Russia. (See articles on the above and summary under Ural-Altaic.)

"Southwestern Asia is practically occupied by Caucasians, with the exception of the Turkish race in Anatolia (Asia Minor). West of the Hindus come their Aryan kinsmen, the Afghans, Beluchis, Persians, Armenians, and Kurds, many of whom are Mohammedan; then come the Semites, including the Jews, Arabs, and Svrians." (Senate Document No. 662, pp. 97-98.)

"Sibiric. That branch of the Mongolian race which comprises the Japanese, Arctic, Tungusic, Finnic, Tartaric, and Mongolic groups, and therefore all the Mongolian peoples which have invaded Europe, such as the Finns, Lapps, Magyars, and Osmanlis or Turks (see these)." (Senate Document No. 662, p. 127.)

"Japanese. The people of Japan.

"With the exception of the 'Arctic group' the Japanese and Koreans form the easternmost group of the great Sibiric branch, which, with the Sinitic branch (Chinese, etc.), constitutes the Mongolian race (see these terms). As was said in the article on Chinese, the Japanese and Koreans stand much nearer than the Chinese, especially in language, to the Finns, Lapps, Magyars, and Turks of Europe, who are the westernmost descendants of the Mongolian race. The languages of all these peoples belong to the agglutinative family, while Chinese is monosyllabic.

"Although many people may mistake a Japanese face for Chinese, the Mongolian traits are much less pronounced. The skin is much less yellow, the eyes less oblique. The hair, however, is true Mongolian, black and round in section, and the nose is small. These physical differences no

doubt indicate that the Japanese are of mixed origin. In the south there is probably a later Malay admixture. In some respects their early culture resembles that of the Philippines of today. Then there is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian-like people in appearance in eastern Asia. They have dwindled away to less than 20,000 under the pressure of the Mongolian invasion from the mainland, but they have left their impress upon the Japanese race. The 'fine' type of the aristocracy, the Japanese ideal, as distinct from the 'coarse' type recognized by students of the Japanese of today, is perhaps due to the Ainu." (Senate Document No. 662, pp. 85-86.)

"Mongol or Mongolic. The subdivision of the Sibiric branch of the Mongolian race or grand division of mankind from which the latter has taken its name. They are interesting historically, in that at different times they have ruled India and still rule, through the Manchu dynasty, China. In the thirteenth century, headed by the descendants of Genghis Khan, they penetrated into Europe as far as Germany. Their only representatives now in Europe are the Kalmuks (see) of southeastern Russia, a decadent stock.

* * * * *

"The Mongols or natives of Mongolia are comparatively unimportant in immigration and international questions, being small in number and located in the interior of Asia, back of China proper. Estimates of their population rate them at only from 2,000,000 to 5,000,000 in numbers, while of Chinese there are perhaps 300,000,000. The Mongols are not so closely related linguistically to the Chinese as they are to the Japanese and even to the Finns, Turks, and Magyars. The Mongols proper extend at present westward over waste regions as far as the Turko-Tartaric populations of Russian central Asia. As they extend on the east nearly to Peking, a few may have found their way to the United States as 'Chinese' immigrants, from whom they are not easily distinguishable." (Senate Document No. 662, p. 97.)

"Sinitic. That branch of the Mongolian race which comprises the Chinese, Indo-Chinese, and Tibetan groups. (See articles on these and on the Sibiric, the only other branch of the Mongolian race.) Not to be confused with the word 'Semitic,' a term referring to certain Caucasian stocks, as Hebrews and Arabs. The word 'Sinitic' is derived from the late Latin 'Sina,' China." (Senate Document No. 662, p. 128.)

"Chinese. The race or people inhabiting China proper. Linguistically, one of the Sinitic groups of the Mongolian or Asiatic race. The name Chinese is also applied, erroneously from an ethnical standpoint, to all the natives of the Chinese Empire, including China proper; that is, to the entire Sibiric group. These are, on the northeast the Manchus, on the north the Mongols, on the west the tribes of Turkestan and of Tibet. The name does not properly apply to the other Sinitic peoples—the Cochinchinese and the Annamese of the French colonies and the Burmese of the British colonies, all of whom border on China on the south and southwest. (See East Indian.) The people of Manchuria and of Mongolia are not so nearly related linguistically to the Chinese as they are to the Japanese (see). All these 'Sibiric' peoples have agglutinative languages, while the Chinese is isolating and monosyllabic, being more nearly related to the languages stretching from Tibet southeast to the Malay Peninsula.

"The Chinese physical type is well known—yellowish in color, with slanting eyes, high cheek bones, black hair, and a flat face. The eye is

more properly described as having the 'Mongolic fold' at the inner angle. This mark is found to some extent in all Mongolian peoples, in the Japanese, and now and then in individuals of the European branches of this race in Russia and Austria-Hungary." (Senate Document No. 662, p. 40.)

"Indo-Chinese. A group of people constituting, with the Chinese and the Tibetan groups, the so-called 'Sinitic' branch of the Mongolian race. (See these and East Indian.) It is confined to the southeastern peninsula of Asia, known as Farther India, and includes not only the Annamese (see), Cochin-Chinese, Tonkinese, and the Cambodians of French Indo-China, but the Burmese (see) of British India and the independent Siamese." (Senate Document No. 662, p. 78.)

"Tibetan. A group of peoples inhabiting central Asia, and therefore of no importance in an immigration study. They are Mongolians and closely related to the Chinese (see these)." (Senate Document No. 662, p. 143.)

Figuiet, in his "The Human Race," includes "the Japanese Family" as a part of the "Sinaic Branch" of "The Yellow Race," the other "families" being the Chinese family and the Indo-Chinese family. (See pp. 302 and following.)

Ratzel in "The History of Mankind," vol. III, page 455, quotes Bordier as assuming no less than six strains in the Japanese people, and "above all" Malays.

James Cowles Prichard, in his "Natural History of Man," published in 1855, in chapter IX, groups together the Chinese and the Indo-Chinese races. At page 234 of vol. I he says:

"The Japanese belong to the same type as the Chinese; they resemble them in many particulars."

Sidney L. Gulick, a missionary of the American board in Japan and one of the most friendly students of the Japanese people, in his "Evolution of the Japanese," says, at page 35:

"that these conquerors" (who gradually took possession of Japan) "were not all of the same stock is proved by the physical appearance of the Japanese today, and by their language. Through these the student traces an early mixture of races—the Malay, the Mongolian and the Ural-Ataic."

Baron Cuvier, in "The Animal Kingdom," published in 1827, refers, at pages 96 and following of vol. I, to three varieties of the human species which particularly merit attention. He describes them as:

1. The fair or Caucasian variety;
2. The yellow or Mongolian;
3. The negro or Ethiopian.

At page 97 he says:

"The Mongolian variety is recognized by prominent cheek bones, flat visage, narrow and oblique eyes, hair straight and black, scanty beard, olive complexion. This race has formed mighty empires in China and Japan
* * *"

In Japan it is common custom when Japanese meet with Chinese at any public gathering or banquet for the first word of greeting to be "Dobun Doshii," which means, "We are people who use the same language and belong to the same race." (Yoshi Kuno, in "What Japan Wants," p. 19.)

Nelson's Encyclopedia, article on "Ethnology," describes four divisions, A, B, C, and D, of the human race as respectively, negro, Mongolic, American and Caucasic. Division B, the Mongolic race, is divided into three sections:

I. Northern (Mongol-Turki); II. Southern (Tibeto-Indo-Chinese); III. Oceanic (Malayan).

The "Northern" section is divided into: 1. Mongol; 2. Turki; 3. Finno-Ugrian; 4. Siberian; 5. Korea-Japanese.

Under this fifth section, Korea-Japanese are listed: (1) Korean; (2) Japanese; (3) Liu Kiu.

Dictionary definitions of "white" or "white persons" are necessarily very comprehensive and are given with reference to many usages other than the uses of lawmakers framing language in such statutes as we are considering.

It is of interest, however, to note among the definitions which are peculiarly applicable to such legislative expression, defining white person: "White Person": "A person of the Caucasian race. (6 Fed. Rep. 256.) * * *." (Webster's New International Dictionary.)

The adjective "white" is defined in the Standard Dictionary as: "Having a light complexion. (1) Of the color of the Eurafican or Caucasian race; opposed especially to negro, but often to the yellow, brown, or red races of men."

IV.

THE TRANSCRIPTS IN THESE TWO CASES INDICATE RECORDS WHICH DO NOT PERMIT OF ARGUMENT THAT POSSIBLY PETITIONERS MAY BE OF THE SO-CALLED "AINU" RACE, WHICH SOME AUTHORITIES BELIEVE TO BE A "WHITE" RACE.

At page 22 of brief for petitioners in the Yamashita case, to the so-called "Ainus" resident in Japan and claimed to be of the Caucasian or white race. It is stated that all that appears of record in this case is that petitioners were born in Japan, and they may have been pure-blooded Ainus, and therefore entitled to citizenship.

There are some sixty million people in Japan proper.

(The Japan Year Book, 1920-21, page 28, by Professor Y. Takenobu of Waseda University, Tokyo, gives the population of Japan proper, October 10, 1920, as 55,961,140; and of the whole Empire, 77,005,510.)

Out of these sixty million in Japan proper less than twenty thousand are Ainus.

"They have dwindled away to less than 20,000 under the pressure of the Mongolian invasion from the mainland * * *." (Senate Document 662, pp. 85-86, "Dictionary of Races or Peoples.")

Wells, in his Outline of History, at pages 108 and 109, says:

"We find a wavy-haired, fairish-skinned race, the Ainu, in Japan. They are more like the Europeans in their facial type than the surrounding yellow Japanese. They may be a drifted patch of the whites or they may be a quite distinct people."

If we assume that they are white, Wells' designation of them as a "drifted patch of the whites" well indicates the extreme to which counsel for petitioners has gone in suggesting that these petitioners might possibly be descended from some of the few remaining Ainus of Japan. They are but a handful of people as compared with the sixty-odd millions of the Japanese race surrounding them.

Throughout this litigation it has been assumed, and of course correctly so, that petitioners are of the Japanese race. It will avail nothing, after all of the litigation herein, at this late date to argue from any other premise.

We do not understand that the presumption of the existence of jurisdictional facts to sustain judgment can be invoked in such a case as this.

So far as the Ozawa case is concerned the petition for citizenship was

denied by the court. The application showed no more than that Ozawa was a native of Japan. The order of the court denying his petition stated that "It appearing that he is ineligible to citizenship," the petition is denied. There is therefore no judgment in that case upon which Ozawa can claim any possible finding to the effect that he is of the white race. Therefore the suggestion of counsel in their brief in the Ozawa case that the question certified is whether any Japanese at all are entitled to citizenship, if perchance there be Japanese of the white race, is not borne out by the record. We must read the questions submitted together with the transcript in the case. There was no showing made by the applicant that he was of the white race.

In the copy of the printed brief for petitioner in the Ozawa case which we are using, pages 32 to 49 are missing. We are endeavoring, at the time of the writing of this brief, to have these missing pages supplied. An examination of the index at page ii of the brief indicates that this missing portion of the brief embraces the subject matter included from subdivision (f) of division I of the Argument, through subdivision (c) of division III.

Not knowing whether we will have these missing pages prior to the time when this case is called, which we understand will be on October 3, 1922, we note that so far as appears from the index the entire subject matter thereof has been answered in this brief, with the exception of the one point suggested in (f) above that "any other construction would be violative of the existing treaty with Japan."

It is obvious that the favored nation clauses of the last Japan-United States Treaty of Commerce and Navigation, signed February 21, 1911, and all language therein with reference to reciprocal rights of the nationals of the two respective Governments in the territories of the other have no reference whatsoever to rights of naturalization.

There are certain mutual rights with reference to commerce and navigation and also of course with reference to the protection of the persons and properties of the Japanese in the United States and of American citizens in Japan. There are, however, no guaranties contained in this treaty or in any other treaty negotiated between the United States and Japan giving any assurances with reference to right to citizenship. This is not a matter for treaty regulation. It is purely a matter for solution by the legislative bodies of the respective Governments, each Government to decide the question in its own way and at such times, irrespective of treaty agreements, as such of the governments may see fit.

V.

CONCLUSION.

Counsel refer to the necessity for continuing the long friendship between Japan and the United States. We respectfully submit that no nation can justly complain of the racial standard set by any other nation in the matter of qualification for citizenship. This is a subject peculiarly within the discretion and control of each nation to determine for itself. To limit rights of citizenship to those of the white race is in no way a reflection upon the intellectual or moral equipment of those of any other race. It is perfectly obvious that from the standpoint of education, intellectual powers, industry, and moral stamina the Japanese people are entitled to and have the unquestioned respect of the people of the United States. The same is true of other nations of the same or different race as the Japanese. This is not a question of comparing the attainments of these people with those of our

own or any other people. It is a question of statesmanship and has been solved and settled for all time by the American people. They have determined, and the world knows of the determination, that they will not grant citizenship to those of the yellow, the brown or the red races. It may be as Dr. Monroe says that "The preservation of a conventional type is a matter of aesthetics. What really counts in humanity is home influence and education and where the ideals are high the racial type is of little moment."

With a clashing of races, however, competing with each other for their very existence as in the agricultural development of the Western states, the racial type is of supreme moment. The economic question must be answered. Wise statesmen have recognized this as a vital question which cannot be ignored.

The world also knows the historical explanation for extending citizenship to those of the black race. If there be serious question as to the wisdom of our forefathers in granting this privilege to those of the black race, there is no question of their wisdom in refusing to grant it to those of the yellow or brown race. To say that the white, the yellow and the brown races can not assimilate is but to express a truism which is recognized by everybody with any knowledge on the subject at all.

It need not occasion surprise if a people, after having been blessed with a marvelous rebirth, and after having achieved a remarkable adaptation of American and European ideas and civilization, should be somewhat over-sensitive and greatly desire that they be not denied citizenship, either in America or in any European country. Yet the statesmen among those people know that it is far better to have the occasional resentment of the unthinking than to create a condition which must produce for all time clash and conflict between dissimilar peoples of distinct races. Whether the privilege of naturalization will be extended to the Japanese is a question which the United States Government must decide for itself. Whether the privilege of naturalization will be extended by the Empire of Japan to Americans is a question which the Empire of Japan must decide for itself. No well-informed American would fail to recognize the intolerable presumption of American insistence that the Empire of Japan extend to Americans the privilege of Japanese citizenship.

It is said in the brief on behalf of petitioner that "Japan looked upon America as her friend and type until she was rudely awakened during the Russo-Japanese war and events in California."

Neither of the half-expressed accusations of this paragraph finds any support in fact.

It would serve no useful purpose if the Japanese could now be erroneously convinced that the United States assumed any other than a proper relation to their Government during that war. But the danger of being so convinced is not great, for the Japanese people will remember the friendly attitude toward them assumed by the then President of the United States and his splendid services in closing that conflict.

No exigency should cause counsel to make a reference to "events in California," from which unwarranted inferences could be drawn. If by this reference there is intended a criticism of the action of California in adopting an Alien Land Law, the reference is peculiarly unfortunate, as well as unwarranted.

It is true that California in 1913 adopted an Alien Land Law and amended that act in 1920, and justification for the adoption of that law is found in the fact that ineligible aliens, including Japanese in large numbers, have taken up their abode and residence in this state. In fact it is stated

by Professor Y. Takenobu of Waseda University, Tokyo, that "more than one-half of the Japanese in North America are found in the State of California." This statement is published in the Japanese year book 1921-22, at page 36.

The Alien Land Act of California, however, is drawn with the fullest regard for treaty rights. Indeed it has been repeatedly determined by the courts, both federal and state, that the Alien Land Act of California does not conflict with the provisions of the treaty existing between the Government of the United States and the Empire of Japan.

In their brief in the Ozawa case counsel ask, "Having given Japanese the bread of western civilization, shall the Japanese be forbidden to eat it?" The progress of the Japanese is as gratifying to the American people, including the people of the State of California, as to any people in the world. That progress in Japan and wherever the Japanese may lawfully be, can not result in anything other than the betterment not only of themselves but of the human race. There are, however, certain fundamental facts in the history of every nation which can not be ignored by far-seeing statesmen. In an agricultural country such as our Western states there can not continue to exist the American farm home life as America has known it if that life is to be placed in competition with the Oriental farmer. One or the other must survive and the inevitable result would be the survival of the Oriental farmer when his method of intensive agricultural development is opposed to that of the American farmer. The American family reared along the lines of American traditions, with the father managing the farm, the mother presiding in the home and the children during their younger years attending school, can not compete with the Oriental farm life wherein children and mother join with the father in the actual farm labor, and in addition do not enjoy conditions of life which are demanded by the American standard of living.

California recognizes what counsel for petitioner refer to as the "earth hunger" of the Japanese. We can not for a moment criticize these people for having this craving for expansion and desire to leave the shores of their own overcrowded land, and come to the hospitable lands and climate of our Western states. That is human nature. But this fact does not make any less serious the inevitable conflict which the people of the Western states in their wisdom are attempting to ward off by enacting legislation which accepts classifications already established over a long period of years by the Federal Government in the matter of citizenship. We have but declared, in strict conformity to all treaty and constitutional rights, that those whom Congress has said are ineligible to citizenship must not own interests in our agricultural lands.

We have studied the questions involved in these cases exhaustively in a sincere attempt to be of assistance to the court. We have studied the many decisions of our American courts and particularly of the federal courts, and have also done research work in authorities on ethnology. We consider it our duty to make a most careful and painstaking examination of this entire subject.

It is, however, indeed gratifying to find that the conclusion reached as a result of this study is the very conclusion reached by our lawmakers as a matter of first impression and by ourselves at the threshold of our investigations. It is perfectly obvious that the average American man, woman or child if asked the question as to the race of the Japanese would without any hesitation answer that Japanese are yellow, brown or possibly a mixture of those two races. Anyone would be astounded on asking such a question to

receive the answer that the Japanese are of the white race. They are popularly referred to over the world as the "little brown men" and such popular appellation bespeaks an understanding of our American people and of the civilized world that the Japanese are not of the white race.

Respectfully submitted.

U. S. WEBB,

Attorney-General of the State of California.

FRANK ENGLISH,

Deputy Attorney-General of the State of California.

5. BRIEF FOR THE UNITED STATES, BY JAMES M. BECK, SOLICITOR-GENERAL.

STATEMENT OF THE CASE.

On October 16, 1914, Takao Ozawa filed his petition in the United States district court for the Territory of Hawaii asking to be naturalized and made a citizen of the United States. The district court denied the prayer for the petition.

The case was carried both by appeal and writ of error to the United States circuit court of appeals for the Ninth Circuit of Appeals (Ctf. 2).

That court on June 4, 1917, addressed a certificate to this court, which recited that the denial of the petitioner's prayer by the district court was based on the ground that he was a person of the Japanese race born in Japan, and not eligible to citizenship under Revised Statutes, section 2169; that the other qualifications were proved, including the statements in the petition, and are so conceded by the Government. (Ctf. 1-3.)

The circuit court of appeals asked the instructions of this court concerning the following questions of law (Ctf. 2):

1. Is the Act of June 29, 1906, 34 Stats. at Large, part 1, page 596, providing "for a uniform rule for the naturalization of aliens", complete in itself, or is it limited by section 2169 of the Revised Statutes of the United States?

2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?

3. If said Act of June 29, 1906, is limited by said section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

These questions can be reduced to two:

First. Is section 2169 of Revised Statutes still of force and to be read with the Act of 1906 as defining to what aliens (other than the class mentioned in section 30) the provisions of the Act of 1906 apply?

Second. Is a person of the Japanese race, born in Japan, eligible to naturalization under the limitations of said section 2169?

Since the questions in this case were certified this court has decided the case of *United States vs. Morena*, 245 U. S. 392, in which it answered in the affirmative the following question certified by the circuit court of appeals for the Third Circuit:

"Is an alien who has made a declaration of intention before the Act of 1906 required to file his petition for citizenship at a time not more than seven years after the date of the act?"

It appears in the record that the petitioner herein declared his intention to become a citizen of the United States on the 1st day of August, 1902, and filed his petition for naturalization on October 16, 1914. His petition,

therefore, was filed more than seven years after the date of the Act of June 29, 1906. Apparently, therefore, under the authority of the Morena case, his petition must ultimately fail, even though this court should sustain his contention with respect to the questions certified.

Under these circumstances it may be that this court will feel that the case is moot and therefore will be unwilling to pass upon the merits. However, the question is one of great importance, and the Government will be glad if the court should conclude to consider and decide it in order that the right of persons of the Japanese race with respect to naturalization may be settled.

There is another case upon the docket of this court, *Yamashita vs. Hinkle, Secretary of State of the State of Washington*, No. 177, which involves another aspect of the same question, and in that case the Government will move for leave to file its brief in the case at bar as *amicus curiae*.

ARGUMENT.

I.

The Act of June 29, 1906, 34 Statutes at Large, C. 3592, entitled "An act to establish a bureau of immigration and naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States," is not complete in itself, but is limited in its application to the eligible classes of persons mentioned in section 2169 of the Revised Statutes.

(1) HISTORY OF THE NATURALIZATION LAWS.

The first law on this subject was passed in 1790, 1 Stat. 103, c. 3. Section 1 of that act provided:

"That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record. * * *" (Repealed by Act of Jan. 29, 1795, c. 20.)

The subsequent acts relating to the question at issue and their provisions have been:

The Act of January 29, 1795, 1 Stat. 414, c. 20, sec. 1, "That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them. * * *" (Repealed by Act of Apr. 14, 1802, c. 28.)

The Act of April 14, 1802, 2 Stat. 153, c. 28, sec. 1:

"That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them. * * *"

The Act of March 26, 1804, 2 Stat. 292, c. 47, sec. 1:

"That any alien, being a free white person, who was residing within the limits and under the jurisdiction of the United States, at any time between the eighteenth day of June, one thousand seven hundred and ninety-eight, and the fourteenth day of April, one thousand eight hundred and two, and who has continued to reside within the same, may be admitted to become a citizen of the United States, without a compliance with the first condition specified in the first section of the act entitled 'An act to establish an uniform rule of naturalization.' * * *"

The Act of March 22, 1816, 3 Stat. 258, 259, c. 32, sec. 2:

"That nothing herein contained shall be construed to exclude from admission to citizenship any free white person who was residing within the limits and under the jurisdiction of the United States between (period just above mentioned, June 18, 1798, and April 14, 1802). * * *"

The Act of May 26, 1824, 4 Stat. 69, c. 186, secs. 1, 4:

"That any alien, being a free white person and a minor, under the age

of twenty-one years, who shall have resided in the United States three years next preceding his arrival at the age of twenty-one years * * * may * * * be admitted a citizen of the United States * * *.

"Sec. 4. That a declaration by any alien, being a free white person, of his intended application to be admitted a citizen of the United States * * * shall be a sufficient compliance with said condition. * * *" (Italics in foregoing statutes are ours.)

The Act of July 14, 1870, 16 Stat. 254, 256, c. 254, sec. 7:

"That the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

It is clear that a provision declaring the character of persons eligible to naturalization, and thus limiting the aliens so eligible, has been a part of every naturalization law, and until 1870 the limitation was to free white persons.

Title XXX of the Revised Statutes, sections 2165 to 2174, inclusive, provides for the naturalization of aliens. Section 2165 prescribes the procedure. Section 2166 provides for naturalization of aliens who have served as United States soldiers and have been honorably discharged. Section 2169 declares what aliens may be naturalized under title XXX, as follows:

"The provisions of this title shall apply to aliens [being free white persons, and to aliens] of African nativity and to persons of African descent." (Italics ours.)

In the first edition of the Revised Statutes of 1875 the words in brackets "being free white persons, and to aliens" were by an error of compilation omitted. This was corrected by the Act of February 18, 1875, 18 Stat. 316, 318, c. 80. A deliberate declaration by Congress of its will to maintain the limitation expressed by the words "white persons"; and this limitation is still the law unless it has been by implication repealed by the Act of 1906 now under consideration.

When the Act of July 14, 1870, 16 Stat. 254, was under discussion an amendment was offered by Charles Sumner to strike out the word "white," but the amendment was rejected through the efforts of the Western Senators, who objected that it would authorize the naturalization of Asiatics. (Cong. Globe for 1869-70, part 6, pp. 5121-5125, 5163, 5176-5177.) While Japan was but once mentioned, and then only casually (p. 5164), the word "Asiatics" was used repeatedly, and it is clear that the debators understood that by the use of the word "white" Japanese were excluded.

This impression is strengthened by the debate in 1875, concerning the reinsertion into the law of the words "free white persons", after their inadvertent omission from the first edition of the Revised Statutes. The committee on the revision of the laws had submitted a bill to correct numerous similar omissions. Mr. Willard moved that the law be permitted to stand as printed, saying:

"It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless this House is thoroughly satisfied that the law as it now stands, with the word "white" stricken out, is not a wise statute. I understand that members from California and the Pacific Coast make objection to the naturalization of Asiatics. More especially the Chinese." (3 Cong. Rec. 1081.)

Mr. Page immediately replied:

"I hope the amendment of the gentleman from Vermont (Mr. Willard) will not prevail. * * * When this question was discussed in the Senate some three or four years ago, upon a motion of Mr. Sumner to strike out the word 'white' from the naturalization laws, the Pacific Coast Senators

at that time prevailed upon him to consent to amend the naturalization laws so as to include persons of African descent, which would exclude Asiatics."

Under a ruling by the Speaker that amendments were out of order, the bill being merely to correct errors, and not to initiate new legislation, Mr. Willard's motion was withdrawn.

A somewhat similar colloquy took place in the Senate, where Mr. Sargent said:

"We have the guaranty of the committees that the provisions of this bill simply restore the law as Congress intended it should be at the time they passed the Revised Statutes. Let that be done, and it is fair. Less than that is unfair. When that is done, if the Senator desires to bring forward a bill which shall enable Asiatics to be naturalized, I shall be prepared to debate that question with him." (3 Cong. Rec. 1237.)

Similarly, Mr. Ferry said:

"Mr. President, it is obvious, after what has fallen from the lips of the Senator from California and the Senator from New York, that the real question after all can not be taken upon the amendment that I have proposed. That question would be whether the Senate would deliberately exclude from the operation of the naturalization laws all Asiatics, a third of the human race or more * * *. I withdraw the amendment." (3 Cong. Rec. 1238.)

(2) The courts, in construing these laws, uniformly held that only "white persons" (aside from those of African descent) were eligible for naturalization.

The uniform judicial construction of the words "white persons" in these acts has been to limit naturalization to people belonging to what is ordinarily and in common speech known as the white or Caucasian race; and there is no reported case in which the naturalization under them was granted to any person belonging to any of the races commonly called the brown, yellow, Mongolian, Malay, or Asiatic races. The following cases were decided prior to the passage of the Act of 1906:

In re Ah Yup, 5 Sawyer 155, Fed. Cas. 104 (Chinese, Circuit Court, District of California, 1878); *In re Hong Yen Chang*, 84 Cal. 163 (Chinese, 1890); *In re Gee Hop*, 71 Fed. 274 (Chinese, Northern District of California, 1895); *In re Po*, 28 N. Y. Supp. 383 (Burmese, City Court of Albany, 1894); *In re Kanaka Nian*, 21 Pac. 993 (Hawaiian, Supreme Court of Utah, 1889); *In re Camille*, 6 Fed. 257 (Indian, Circuit Court of Oregon, 1880); *In re Burton*, 1 Alaska 111 (Indian, 1900); *In re Saito*, 62 Fed. 126 (Japanese, Circuit Court, District of Massachusetts, 1894).

In re Ah Yup, 5 Sawyer 155, was a petition by a Chinese for naturalization. In denying the petition the court said:

"Words in a statute, other than technical terms, should be taken in their ordinary sense. The words 'white person', as well argued by petitioner's counsel, taken in a strictly literal sense, constitute a very indefinite description of a class of persons, where none can be said to be literally white, and those called white may be found of every shade from the lightest blonde to the most swarthy brunette. But those words, in this country at least, have undoubtedly acquired a well-settled meaning in common popular speech, and they are constantly used in the sense so acquired in the literature of the country, as well as in common parlance. As ordinarily used everywhere in the United States, one would scarcely fail to understand that the party employing the words 'white person' would intend a person of the Caucasian race.

"In speaking of the various classification of races, Webster in his

Dictionary says: "The common classification is that of Blumenbach, who makes five: 1. The Caucasian, or white race, to which belong the greater part of the European nations and those of western Asia; 2. The Mongolian, or yellow race, occupying Tartary, China, Japan, etc.; 3. The Ethiopian, or negro (black) race, occupying all Africa, except the north; 4. The American, or red race, containing the Indians of North and South America; and, 5. The Malay, or brown race, occupying the islands of the Indian Archipelago, etc. This division was adopted from Buffon, with some changes in names, and is founded on the combined characteristics of complexion, hair and skull. Linnaeus makes four divisions, founded on the color of the skin: '1. European, whitish; 2. American, coppery; 3. Asiatic, tawny, and 4. African, black.' Cuvier makes three: Caucasian, Mongol, and negro. Others make many more, but no one includes the white or Caucasian with the Mongolian or yellow race; and no one of those classifications recognizing color as one of the distinguishing characteristics include the Mongolian in the white or whitish race. (See New American Cyclopaedia, title 'Ethnology.')

"Neither in popular language, in literature, nor in scientific nomenclature do we ordinarily, if ever, find the words 'white person' used in a sense so comprehensive as to include an individual of the Mongolian race. Yet in all, color, notwithstanding its indefiniteness as a word of description, is made an important factor in the basis adopted for the distinction and classification of races. * * *

Other cases refusing naturalization to Chinese were *In re Hong Yen Chang*, 84 Cal. 163, and *In re Gee Hop*, 71 Fed. 274.

In re Saito, 62 Fed. 126, was a petition by a Japanese for naturalization. In denying the petition the court said (p. 126):

"This is an application by a native of Japan for naturalization.

"The act relating to naturalization declares that 'the provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.' (Rev. St., sec. 2169.) The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term 'white persons'."

This opinion then gives a history of the legislation resulting in the correction of Revised Statutes, section 2169, which has been hereinbefore recited.

"The history of legislation on this subject shows that Congress refused to eliminate 'white' from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

"The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

"From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races." (P. 127.)

By the same reasoning it was held that a Burmese was not entitled to naturalization (*In re Po*, 28 N. Y. Supp. 383); nor a Hawaiian of the Malay race (*In re Kanaka Nian*, 21 Pac. 993); nor an Indian (*In re Camille*, 6 Fed. 256; *In re Burton*, 1 Alaska 111).

At the time of the passage of the Act of 1906, therefore, through a uniform course of judicial construction of statutory language, continued in the law for over a century, it had become settled that Japanese and all other people not of the white or Caucasian race were not eligible for naturalization as "white persons."

(3) The Act of 1906 did not extend the privilege of naturalization to any persons not theretofore eligible.

(a) *The purpose of the act.*

The purpose of the Act of 1906 was to stop the flagrant abuses and frauds which had become scandalous, by providing safeguards and a strict and uniform procedure. The act was the result of the labors of a commission appointed by an executive order of President Roosevelt issued March 1, 1905. The commission consisted of one officer each from the Departments of State, Justice, and Commerce and Labor. Their report was transmitted to Congress by the President on December 5, 1905 (H. Doc. No. 44, 59th Cong., 1st sess.), and its recommendations formed the basis of the bill which became the act under consideration.

In its report the commission quoted from the report of the Attorney-General for 1903 the following language contained in a report to Mr. Van Deuzen, special examiner of the Department of Justice:

"The evidence is overwhelming that the general administration of the naturalization laws has been contemptuous, perfunctory, indifferent, lax, and unintelligent, and in many cases, especially in inferior state courts, corrupt."

The chief motive which led to fraudulent naturalization was the desire to vote, which caused corrupt politicians to encourage perjury and commit bribery, under the guise of paying naturalization fees, especially just before election. Another motive was found in the labor laws and the rules of some labor unions which prevented the employment of aliens in certain classes of work. Another motive was the desire of aliens to go abroad under the protection of the United States. There was no uniformity in the actual admission of aliens to citizenship by reason of the fact that they were admitted by many different courts, state and federal, with no uniform procedure, many of them of inferior jurisdiction and presided over by inferior judges, and, in practice, the entire proceedings were often turned over to the clerk of the court. It was to correct these abuses that the Act of 1906 was framed.

After referring to previous legislation and to the fact that the Act of 1802 was still in force, the report says of that act:

"The principles laid down in that act are, in the commission's opinion, sound, and should not be changed. * * *

"Accepting the principles laid down in the old law, the commission makes the recommendation contained in this report with a view to preventing violations of the law; but it also recommends that the following additional principles be incorporated into the law:

"First, That no one be admitted to citizenship who does not intend to reside permanently in the United States. This recommendation is discussed in another part of this report.

"Second. That no one be admitted to citizenship who does not know the English language." (*Italics ours.*)

The bill afterwards reported in the House by the committee on immigration and naturalization followed the recommendation of the commission. Mr. Bonyng, in presenting the bill to the House, referred to the fact that the laws respecting naturalization were practically the same as they had been written by James Madison in 1795. He then said:

"The bill which we present today does not change the fundamental law in reference to naturalization, except in two particulars, to which I will address myself a little later; but it does provide for a general and uniform system of naturalization to be enforced throughout the United States." (Cong. Record, vol. 40, part 4, p. 3640.)

The two changes in the fundamental law, he afterwards explained, were

(1) requiring the applicant to be able to write either in his own language or the English language and to be able to read, speak and understand English; and (2) he must intend to reside permanently in the United States. In the course of his remarks Mr. Bonyngne referred to the great amount of fraud which had grown up under the old law and to the appointment of a special prosecuting attorney who in two years had secured 685 convictions and the cancellation of 1916 fraudulent certificates.

The act does not purport to declare who are entitled to be naturalized. Sections 1 and 2 create and provide for the bureau of immigration and naturalization and the procedure by which naturalization can be effected. Section 27 prescribes the forms to be used. Section 15 provides for the cancellation of certificates of naturalization fraudulently or illegally procured. Sections 16 and 25 create certain crimes in connection with the subject of naturalization and provide for their punishment. Section 26 prescribes what laws are repealed by this act. Section 28 empowers the Secretary of Commerce and Labor to make rules and regulations and declares that certified copies of all papers, etc., provided for by the act are admissible in evidence instead of originals. Section 29 makes an appropriation to carry the act into effect. Section 30 provides for naturalizing all persons not citizens who owe permanent allegiance to the United States. Section 31 declares when the act shall take effect. This completes the act.

The aliens, citizens or subjects of other countries eligible to naturalization under the laws of the United States, can not be discovered from the Act of 1906.

(b) *Section 2169, R. S., not repealed.*

Section 26 of the Act of 1906 expressly repeals sections 2165, 2167, 2168, and 2173 of the Revised Statutes and section 39 of the Act of March 3, 1903, 32 Stat. 1213, 1222, c. 1012. The subject matter of these repealed acts is covered by parts of the Act of 1906. The remaining sections of title XXX not so repealed are sections 2166, which makes special provision for honorably discharged soldiers; 2170, which makes five years' residence necessary; 2171, which forbids the admission of enemy aliens; 2172, which provides for the children of naturalized persons; 2174, which makes special provision for seamen; and 2169, the section under consideration, and which remained the only provision on the statute books defining those entitled to be naturalized. It is inconceivable that section 2169 would not have been named as repealed unless it was purposely left as a part of the law retained. (*In re Alverto*, 198 Fed. 688, 690.)

To hold otherwise, in view of the long line of judicial decisions with which Congress was of course familiar, would mean to decide that the settled policy of the nation for more than a century with respect to a matter of the most vital concern is, by mere implication, to be deemed changed in a most radical manner.

(c) *Section 2169, R. S., was specifically reaffirmed by the Act of May 9, 1918, 40 Stat. 542, c. 69.*

After this case was certified to this court, Congress passed the Act of May 9, 1918. This act added seven new subdivisions to section 4 of the Act of 1906, making special provision for the naturalization of Filipinos, Porto Ricans and aliens who served in the naval and military forces of the United States. It also contained provisions regarding enemy aliens, and repealed certain sections of the Revised Statutes, including sections 2166, 2171, and 2174, and further provided:

"That all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall

repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined." (*Italics ours.*)

This is a clear recognition and declaration that it had not been repealed, and an expression of the legislative intention to keep it in force, except as expressly therein modified.

In the brief submitted on behalf of the petitioner herein an attempt is made to repel the clear inference to be drawn from this saving clause in the repealing section by an elaborate argument which reaches the conclusion that, though section 2169 is retained in the law, "It no longer has any application." (Petitioner's brief, pp. 33-36.) It is stated that "the first of these subdivisions numbered 'seventh' is a curiosity chiefly because of the anomalous allegiance of the Filipino and Porto Rican" (p. 33), and that "there is no seventh subdivision of this act unless it be entitled 'thirteenth'" (p. 36). There is, nevertheless, a subdivision designated "seventh", and its provisions and their relation to section 2169 are perfectly clear when they are examined for the purpose of finding that they have a meaning rather than for the purpose of finding that they have not. Their effect is to authorize naturalization of Filipinos and Porto Ricans who served in the military forces of the United States, and permitting naturalization of all aliens who had so served without complying with many formalities required of others, but did not enlarge the right to naturalization, except in the cases of Filipinos and Porto Ricans.

In re Easurk Emsen Charr, 273 Fed. 207 (district court, Western District of Missouri, April, 1921).

That case was a petition for naturalization by a native of Korea, a subject of the Mikado of Japan, who was drafted, served in the Army of the United States and honorably discharged. His educational qualifications, character, and military record were good. His petition was opposed and denied upon the sole ground that members of his race were barred under section 2169 of the Revised Statutes, as the Act of 1918 did not enlarge the limitation imposed by that section except as to Filipinos and Porto Ricans. The application was naturally one which would strongly appeal to the court, and Judge Van Valkenburgh gave it most painstaking care, even to the extent of a rehearing. His opinion covers the whole field of the naturalization laws logically and concisely.

The court says of the Act of 1918 (pp. 210-212):

"The purpose of this act is well understood. It was to reward those aliens who had entered the military or naval service of the United States, as therein described, by admitting them to citizenship without many of the slow processes, formalities, and strictness of proofs which were rigidly provided and enforced under the law affecting naturalization as it existed then, and as it exists now. The amendments made were not to the title as a whole, but primarily to section 4 of this Act of June 29, 1906, 34 Stat. 596. This section deals not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. * * *

"Incidentally it has been urged that section 2169 was repealed, by implication, by the Act of June 29, 1906 (34 Stat. 596). The contention has uniformly been rejected, and notably in cases involving Filipinos. (*In re Alverto* [D. C.], 198 Fed. 688; *In re Rallos* [D. C.], 241 Fed. 686; *In re Lampitoe* [D. C.], 232 Fed. 382; *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.)

"If, as contended by the petitioner, the exception reserved was intended to mean any alien who should perform military service, it is difficult to perceive why the provision as to the continuing force of section 2169 was necessary at all; the limitation of military or naval service being sufficient to preserve that section intact in all its general features. This view is corroborated and emphasized by the fact that, throughout the original title 30, Revised Statutes of 1878, the term 'any alien' is used repeatedly without qualification, the limitation to free white persons and those of African nativity and descent being raised entirely from section 2169; and the same is true of section 2166 and other acts conferring special privileges upon soldiers and sailors. Moreover, as has been previously stated, the Act of May 9, 1918, was chiefly intended to modify section 4 of the Act of 1906 as to procedure merely, shortening the time and smoothing the way to citizenship. Section 2169 has to do only with racial qualifications and out of abundance of caution it was expressly reaffirmed."

On petition for rehearing, the court reaffirmed its decision and quoted from the report of the Senate commission of immigration upon the Act of 1918, which contained this significant language (p. 214):

"It (section 2 of the act) also declares that nothing in the act shall enlarge or repeal in any way section 2169 of the Revised Statutes, except as specified in the seventh subdivision and under the limitation therein defined. This means that Filipinos may be naturalized who are enlisted in the Army or Navy of the United States and are honorably discharged therefrom."

(d) *Judicial interpretation since 1906.*

Since the passage of the Act of 1906 the courts without exception have continued to hold that section 2169, R. S., was still in force, its limitation still binding.

In re Alverto, 198 Fed. 688; *In re Kumagai*, 163 Fed. 922; *In re Knight*, 171 Fed. 299; *In re Young*, 198 Fed. 715; *Bessho vs. U. S.*, 178 Fed. 245; *U. S. vs. Balsara*, 180 Fed. 694; *In re Yamashita*, 30 Wash. 234; *In re Dow*, 226 Fed. 145; *In re Easurk Emsen Charr*, 273 Fed. 207; *In re Halladjian*, 174 Fed. 834; *In re Bautista*, 245 Fed. 765; *In re Mohan Singh*, 257 Fed. 209; *In re Sadar Bhagwat Singh*, 246 Fed. 496; *In re Lampitoe*, 232 Fed. 382; *In re Mozundar*, 207 Fed. 115.

In re Kumagai (1908), 163 Fed. 922, was an application by an "educated Japanese gentleman" (p. 923), honorably discharged from the Regular Army, for naturalization. The district court for the Western District of Washington, in denying the application, held that section 2166, R. S., authorizing the naturalization of aliens honorably discharged from the military service of the United States, did not, in view of section 2169, R. S., permit the naturalization of a Japanese who had served as a soldier in the United States Army, and said (p. 924):

"* * * The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarcation between races and to extend the privileges of naturalization only to those of that race which is predominant in this country." (Citing the *Ah Yup*, *Saito*, and *Yamashita* cases.)

In re Knight, 171 Fed. 299, was an application by one whose father was English and whose mother was half Japanese and half Chinese. He had been honorably discharged from the United States Navy and had a medal for service in the Battle of Manila. The district court, Eastern District of New York (1909), denied the application, following the *Kumagai* case.

Bessho vs. United States (1910), 178 Fed. 245, was an appeal from the

district court for the Eastern District of Virginia to the circuit court of appeals, Fourth Circuit. The applicant was a Japanese who had been honorably discharged from the United States Navy. The district court denied the application and its decision was affirmed by the court of appeals, holding, after a review of the naturalization laws, that section 2169 of the Revised Statutes remained unrepealed by the Act of 1906, and limited the privilege of naturalization to white persons and persons of African nativity or descent. "The intention was to exclude from naturalization all aliens except those of the Caucasian and African races."

United States vs. Balsara, 180 Fed. 694 (circuit court of appeals, Second Circuit, 1910), was an appeal from an order admitting to citizenship a Parsee. The court of appeals affirmed the order holding that the Parsees were white persons within the meaning of section 2169 of the Revised Statutes. The right of the applicant to be naturalized was strongly opposed by the Government, and, as the court says, complete and interesting briefs were furnished. The contention of the Government was that Congress, by the words "white persons" intended to include Europeans only, while counsel for Balsara insisted that the intention was to confer the privilege of naturalization upon members of the white or Caucasian race only. The court said (pp. 695-697):

"This we think the right conclusion and the one supported by the great weight of authority. (*In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104; *In re Saito* [C. C.], 62 Fed. 126; *In re Camille* [C. C.], 6 Fed. 256; *Matter of San C. Po*, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; *In re Buntaro Kumagai* [D. C.], 163 Fed. 922; *In re Knight* [D. C.], 171 Fed. 297; *In re Najour* [C. C.], 174 Fed. 735; *In re Halladjian* [C. C.], 174 Fed. 834.)

"Doubtless congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term 'Caucasian race' mentioned in some of the foregoing decisions. They probably had principally in mind the exclusion of Africans, whether slave or free, and Indians, both of which races were and had been objects of serious public consideration. The adjective 'free' need not have been used, because the words 'white persons' alone would have excluded Africans, whether slave or free, and Indians. Still effect must be given to the words 'white persons.' The congressmen certainly knew that there were white, yellow, black, red, and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we can not believe he would have been excluded on the ground that he was not a white person, and, if a Parsee had applied, the court would have had to determine then, just as the circuit court did in this case, whether the words used in the act did or did not cover him.

"We think that the words refer to the race and include all persons of the white race, as distinguished from the black, red, yellow or brown races, which differ in so many respects from it. * * *

"Counsel for certain Syrian interveners as *amici curiae* contend that the words 'free white persons' were used simply to exclude slaves and free negroes. If so, of course, all other aliens were included. This is enforced by the further argument that the Act of June 29, 1906 (Act June 29, 1906, c. 3592, 34 Stat. 596; U. S. Comp. St. Supp. 1909, p. 97), repealed section 2169, Rev. St. U. S., by necessary implication and that all aliens except those expressly excluded, like the Chinese, are now eligible to citizenship. * * * It seems to us incredible that Congress could have intended to make such a departure from existing law by implication merely."

In re Young, 198 Fed. 715, district court, Western District of Washington, 1912, was an application by a man whose father was German and

whose mother was Japanese. The application was denied. The court said (p. 716):

"The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites' or 'dark whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin.

"It is just as certain that, whether we consider the Japanese as of the Mongolian race or the Malay race, they are not included in what are commonly understood as 'white persons.' In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it can not be said that one who is half white and half brown or yellow is a white person, as commonly understood."

In re Bautista, 245 Fed. 765, district court, Northern District of California, 1917, was a petition for naturalization by a Filipino, born in the Philippine Islands while they were under Spanish rule, who was serving his third term of enlistment in the United States Navy, and who had resided continuously in the United States for more than eight years, and the court held that he was entitled to be naturalized under section 30 of the Act of 1906, as a person who owed permanent allegiance to the United States. The court held that while section 2169 of the Revised Statutes had not been repealed, the distinction of color therein contained must yield to section 30 of the Act of 1906.

In re Lampitoe, 232 Fed. 382, district court, Southern District of New York, 1916, was a petition for naturalization by one whose mother was a Filipino and whose father was half Filipino and half Spanish. The application was denied solely on the ground of his race, the court saying (p. 382):

"Where the Malay blood predominates it would be a perversion of language to say that the descendant is a 'white person.'"

In re Halladjian, 174 Fed. 834, circuit court, District of Massachusetts, 1909, was an application by four Armenians for naturalization, which was granted. In granting the application, Judge Lowell wrote a long, learned, and most interesting opinion, in which he departed somewhat from the views which had been expressed by other judges. He was disposed to hold that the words "white persons" were used to designate persons not otherwise classified as a sort of "catch-all" to include everybody except negroes and Indians. He held that there was no European or white race and no Asiatic or yellow race, and that the mixture of races in western Asia for 25 centuries raises a doubt if its individual inhabitants can be classified by race, but if the ordinary classification is followed, Armenians have always been reckoned as Caucasians and white persons and that the applicants were white persons in appearance, not darker in complexion than some persons of northern European descent, and he also finds that the use of the word "white" as a "catch-all" according to his idea has been narrowed so as to exclude Chinese and Japanese.

In re Sabar Bhagwab Singh, 246 Fed. 496, district court, Eastern District of Pennsylvania, 1917, was an application for naturalization by a Hindu and the application was denied. A long and interesting opinion was written by Judge Dickinson, his conclusion being that the Hindu was not a white person within the meaning of the statutes.

In re Mohan Singh, 257 Fed. 209, district court, Southern District of California, 1919, was another application for naturalization by a Hindu

and the application was granted in this case. The court also wrote a long and interesting opinion, in which it was unable to agree with Judge Dickinson in the Sabar Bhagwab Singh case, 246 Fed. 496. In the course of the opinion the court said (pp. 211, 212):

"In spite of the discussions and not infrequent controversies in the courts, which have arisen with respect to the meaning of the phrase, Congress has seen fit at no time since its incorporation into the law to change it, and it remains to-day as it was originally enacted more than a century and a quarter ago. * * * The possession of a 'common racial stamp' is the basis of classification.

"My conclusion is that, in the absence of any more definite expression by Congress, which is the body possessing the power to determine who may lawfully apply for naturalization, any member of the white or Caucasian race, possessing the proper qualifications in every other respect, are entitled to admission under the general wording of the statute respecting 'all free white persons.'"

In re Mozumdar, 207 Fed. 115, district court, Eastern District of Washington, 1913, was an application for naturalization by a Hindu. The court held him to be a white person and granted the application.

II.

ONE OF THE JAPANESE RACE, BORN IN JAPAN, IS NOT A WHITE PERSON WITHIN THE MEANING OF SECTION 2169 OF THE REVISED STATUTES, AND, THEREFORE, MAY NOT BE NATURALIZED.

Unless, then, all the mass of judicial interpretation of congressional action which has been on the statute books for years, of which Congress must have had knowledge, is wholly wrong, or unless Congress has silently acquiesced in what, if wrong, has amounted to continuous and wholesale defiance of the congressional will, a Japanese may not be naturalized unless he is a white person. So the ultimate question is, is the Japanese a white person? and it presents itself as a question of statutory construction. In the first place it is said that we must give to these words the meaning which they had in the minds of the legislators of 1790, which is probably true; and that they were then used as a sort of "catch-all" and meant all men except negroes and Indians, which is surely untrue.

It is undoubtedly true that the men of 1790 used the words as they understood them and that their purview of possible and probable immigration comprised only negroes and white men. But there is no warrant for believing that in their minds the whole human race consisted all of black men, red men and white men. To do so is to deny them the intelligence which they surely possessed. But, on the other hand, to argue that they cast their eyes over the earth and considered the races thereof, and then with deliberation chose to exclude Chinese, Japanese and the other yellow and brown peoples is to give them credit for an imagination which they did not have. To ascertain their intent it is not necessary to entangle one's common sense in a web of theory. The men who settled this country were white men from Europe and the men who fought the Revolutionary War, framed the Constitution and established the Government were white men from Europe and their descendants. They were eager for more of their kind to come, and it was to men of their own kind that they held out the opportunity for citizenship in the new nation. It is quite probable that no member of the First Congress had ever seen a Chinese, Japanese or Malay, or knew much about them beyond the fact that they were people living in remote and almost inaccessible parts of the world, having manners, customs and language which seemed strange, and unwilling to mingle

with western people. Chinese immigration to this country did not begin until after the discovery of gold in California, and the census of 1890 was the first to report Japanese, 55 in number.

It is a matter of common knowledge that for many years Japan (and, to a somewhat less degree, China) maintained a policy of isolation, and this policy continued from the middle of the seventeenth century until the Perry expedition, in 1853. American thought and statesmanship were directed toward Europe, not toward Asia. It was "Europe" and its "set of primary interests" with which Washington was concerned in his Farewell Address, and it was against interweaving our destiny with that of any part of "Europe", or entangling our peace and prosperity in the toils of "European" ambitions, that he warned his countrymen. It was European trade that was sought, and, beyond doubt, European immigration which was desired and expected.

The possibility of Chinese or Japanese immigration probably never was considered. And that is the good and sufficient reason for holding that the words "white persons", as then used, were not a "catch-all" for all people not black or red. The fathers offered citizenship to men of the kind they knew and hoped and expected would come, not to those they did not know and did not expect to come. Citizenship has always been deemed a choice possession, and it is not to be presumed that our fathers regarded it lightly, to be conferred promiscuously according to a "catch-all" classification. It would only be obtained by those to whom it was given, and the men of 1790 gave it only to those whom they knew and regarded as worthy to share it with them, men of their own type, white men. This does not imply the drawing of any narrow or bigoted racial lines, but a broad classification inclusive of all commonly called white and exclusive of all not commonly so called. This has been the rule followed by the courts, and the cases already cited, many of which show exhaustive research and wealth of learning, leave very little to be said. A reading of the opinion of the judges who have written in these cases reveals impressive unanimity in one respect. Each person admitted, with the single exception of the Filipino (*In re Bautista, supra*, a special case), was admitted because he was deemed as matter of fact to be white; each person refused was refused because he was deemed as matter of fact not to be white. The ethnological discussions have covered a wide range of most interesting subjects, particularly in the borderline cases, the Syrian case (*In re Dow*, 226 Fed. 145) and the Armenian case (*In re Halladjian*, 174 Fed. 834). But the present case cannot be regarded as a doubtful case. The Japanese is not, and never has been, regarded as white or of the race of white people.

While the views of ethnologists have changed in details from time to time, it is safe to say that the classification of the Japanese as members of the yellow race is practically the unanimous view. Unless it could be demonstrated that the Japanese were of the white race, ethnological differences would be unimportant, even if otherwise relevant.

The history of the several views as to the divisions of mankind is given in the *Encyclopedia Britannica* (11th Ed., vol. 11, p. 113—Anthropology), as follows:

"Classifications of man have been numerous, and though regarded as systems, most of them are unsatisfactory, yet they have been of great value in systematizing knowledge, and are all more or less based on indisputable distinctions. J. F. Blumenbach's division, though published as long ago as 1781, has had the greatest influence. He recognizes five races, viz., Caucasian, Mongolian, Ethiopian, American, Malay. * * * The yet simpler classifica-

tion by Cuvier into Caucasian, Mongol and negro corresponds in some measure with a division by mere complexion into white, yellow and black races; but neither this threefold division nor the ancient classification into Semitic, Mamic and Japhetic nations can be regarded as separating the human types either justly or sufficiently. * * * On the whole, Huxley's division probably approaches more nearly than any other to such a tentative classification as may be accepted in definition of the principal varieties of mankind, regarded from a zoological point of view, though anthropologists may be disposed to erect into separate races several of his widely different sub-races. He distinguishes four principal types of mankind, the Australoid, Negroid, Mongoloid and Zanthochroic ('fair whites'), adding a fifth variety, the Melanochroic ('dark whites')."

The article on Ethnology in this same authority divides the peoples as follows: "(a) Caucasian or white men. * * * (b) Mongolic or yellow men. * * * Of the typical Mongolic races the chief are the Chinese, Tibetans, Burmese, Siamese * * * the pure Turkic peoples and the Japanese and Koreans. Less typical, but with the Mongolic elements so predominant as to warrant inclusion, are the Malay peoples of the Eastern Archipelago. * * * (c) Negroid or black man." (Encyc. Britannica, 11th Ed., vol. ix, p. 851.)

Very recent authorities say:

"The modern Japanese are a very mixed people. The largest factor in the production of the Japanese is to be traced back to the Mongolian race of the adjacent continent." (X New Int. Encyc. [Japan], p. 335.)

"Language and anthropology show that the predominating element in the Japanese race is Mongol." (VI Nelson's Encyc. [Japan], p. 567.)

The article on Japan in volume 15 of the Encyclopedia Britannica, 11th Edition, 1911, is written by Baron Kakuchi, president of the Imperial University of Kyoto, and the following information is from that article:

Speaking of the physical characteristics of the Japanese he says:

"The Japanese, the Koreans and the Chinese resemble each other so closely that, under similar conditions as to costumes and coiffure, no appreciable difference is apparent."

He speaks of an "exhaustive anthropological study of the Japanese" made by Dr. E. Baelz, emeritus professor of medicine in the Imperial University of Tokyo, who enumerates the following subdivisions of the race inhabiting the Japanese Islands:

"The first and most important is the Manchu-Korean type; that is to say, the type which prevails in north China and in Korea * * *. The second type is the Mongol. It is not very frequently found in Japan, perhaps because, under favorable social conditions, it tends to pass into the Manchu-Korean type. * * * More important than either of these types, as an element of the Japanese nation, is the Malay. * * * None of the above three, however, can be regarded as the earliest settlers in Japan. Before them all was a tribe of immigrants who appear to have crossed from north-eastern Asia at an epoch when the sea had not yet dug broad channels between the continent and the adjacent islands. These people—the Ainu—are usually spoken of as the aborigines of Japan. * * * They once occupied the whole country, but were gradually driven northward by the Manchu-Koreans and the Malays until only a mere handful of them survived in the northern Island of Yezo. * * * Amalgamation has been completely effected in the course of long centuries, and even the Ainu, though the small surviving remnant of them now live apart, have left a trace upon their conquerors." (P. 165.)

The Encyclopedia Americana, 1919, title "Ethnology," says:

"After successive efforts by able students to classify mankind upon this or that character or group of characters, the tendency now seems to be to return to the earlier classification. To recur to the three greater subdivisions—white, black and yellow; or Caucasian, negro, Mongolian.

"With all the data gathered and the characters used in succeeding classifications, the original color plan, in a general way, is as good as we know. Popularly, too, this seems to have struck the fancy. Without thought we speak of a person as white, black or red, as he is a Caucasian, negro, or American Indian."

The article classifies the Japanese with the Koreans, as a group of the Sibiric branch of the Asiatic or Mongolian race, whose characteristic color is yellow or olive.

It is not important to the present purpose to settle accurately all these interesting questions. It is enough that there remains undisturbed the legal and popular conception that the Japanese are not white persons within the meaning of the naturalization laws.

A claim has been made that the aboriginal people of the Japanese Islands called Ainus were of the white or Caucasian stock. Even if this be true, and it is at most mere conjecture, they have been driven out by the Manchu-Koreans and Malays until, as Baron Kakuchi says, *supra*, "only a mere handful" survived; and while even they "have left a trace upon their conquerors," it can not be said that the Japanese people are, therefore, white any more than it can be said that the trace of Indian influence has made the American people red. Furthermore, there is nothing in the case to show that the petitioner is an Ainu.

The decision of the district judge in this case is a valuable contribution to the solution of the questions presented by this certificate and is printed as an appendix to this brief. It seems unnecessary to repeat the discussions there set forth.

CONCLUSION.

It is therefore respectfully submitted:

That the first question certified should be answered that the Act of June 29, 1906 (34 Stats. at Large, part 1, p. 596), is limited by section 2169 of the Revised Statutes of the United States.

That the second question should be answered in the negative.

As to the third question, it is respectfully suggested that, under the facts stated in the certificate, it is embraced in questions one and two, and that as applied to the facts of this record, the third question should be answered in the negative.

September, 1922.

JAMES M. BECK,

Solicitor-General.

ALFRED A. WHEAT,

Special Assistant to the Attorney-General.

6. DECISION OF THE COURT.

November 13, 1922.

Mr. Justice Sutherland delivered the opinion of the court.

The appellant is a person of the Japanese race born in Japan. He applied on October 16, 1914, to the United States district court for the Territory of Hawaii to be admitted as a citizen of the United States. His petition was opposed by the United States district attorney for the District of Hawaii. Including the period of his residence in Hawaii, appellant had

continuously resided in the United States for twenty years. He was a graduate of the Berkeley, California, High School, had been nearly three years a student in the University of California, had educated his children in American schools, his family had attended American churches and he had maintained the use of the English language in his home. That he was well qualified by character and education for citizenship is conceded.

The district court of Hawaii, however, held that, having been born in Japan and being of the Japanese race, he was not eligible to naturalization under section 2169 of the Revised Statutes, and denied the petition. Thereupon the appellant brought the cause to the circuit court of appeals for the Ninth Circuit and that court has certified the following questions, upon which it desires to be instructed:

"1. Is the Act of June 29, 1906 (34 Stats. at Large, part 1, p. 596), providing 'for a uniform rule for the naturalization of aliens' complete in itself, or is it limited by section 2169 of the Revised Statutes of the United States?"

"2. Is one who is of the Japanese race and born in Japan eligible to citizenship under the naturalization laws?"

"3. If said Act of June 29, 1906, is limited by section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?"

These questions for purposes of discussion may be briefly restated:

1. Is the Naturalization Act of June 29, 1906, limited by the provisions of section 2169 of the Revised Statutes of the United States?

2. If so limited, is the appellant eligible to naturalization under that section?

First. Section 2169 is found in title XXX of the Revised Statutes, under the heading "Naturalization", and reads as follows:

"The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

The Act of June 29, 1906, entitled "An act to establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," consists of thirty-one sections and deals primarily with the subject of procedure. There is nothing in the circumstances leading up to or accompanying the passage of the act which suggests that any modification of section 2169, or of its application, was contemplated.

The report of the House committee on naturalization and immigration, recommending its passage, contains this statement:

"It is the opinion of your committee that the frauds and crimes which have been committed in regard to naturalization have resulted more from a lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such matters. The two changes which the committee has recommended in the principles controlling in naturalization matters and which are embodied in the bill submitted herewith are as follows: First, the requirement that before an alien can be naturalized he must be able to read, either in his own language or in the English language, and to speak or understand the English language; and, second, that the alien must intend to reside permanently in the United States before he shall be entitled to naturalization."

This seems to make it quite clear that no change of the fundamental character here involved was in mind.

Section 28 of the act expressly repeals sections 2165, 2167, 2168, 2173 of title XXX, the subject matter thereof being covered by new provisions. The

sections of title XXX remaining without repeal are: Section 2166, relating to honorably discharged soldiers; section 2169, now under consideration; section 2170, requiring five years' residence prior to admission; section 2171, forbidding the admission of alien enemies; section 2172, relating to the status of children of naturalized persons, and section 2174, making special provision in respect of the naturalization of seamen.

There is nothing in section 2169 which is repugnant to anything in the Act of 1906. Both may stand and be given effect. It is clear, therefore, that there is no repeal by implication.

But it is insisted by appellant that section 2169, by its terms, is made applicable only to the provisions of title XXX and that it will not admit of being construed as a restriction upon the Act of 1906. Since section 2169, it is in effect argued, declares that "the provisions of this title shall apply to aliens being free white persons * * *," it should be confined to the classes provided for in the unrepealed sections of that title, leaving the Act of 1906 to govern in respect of all other aliens, without any restriction except such as may be imposed by that act itself.

It is contended that thus construed the Act of 1906 confers the privilege of naturalization without limitation as to race, since the general introductory words of section 4 are: "That an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise." But, obviously, this clause does not relate to the subject of eligibility, but to the "manner", that is the procedure, to be followed. Exactly the same words are used to introduce the similar provisions contained in section 2165 of the Revised Statutes. In 1790 the first Naturalization Act provided that "Any alien, being a free white person, may be admitted to become a citizen * * * on the following conditions and not otherwise." (2 Stat. 1799-1813, p. 153.) This was subsequently enlarged to include aliens of African nativity and persons of African descent. These provisions were restated in the Revised Statutes, so that section 2165 included only the procedural portion, while the substantive parts were carried into a separate section (2169) and the words "an alien" substituted for the words "any alien".

In all of the Naturalization Acts from 1790 to 1906 the privilege of naturalization was confined to white persons (with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. If Congress in 1906 desired to alter a rule so well and so long established, it may be assumed that its purpose would have been definitely disclosed and its legislation to that end put in unmistakable terms.

The argument that, because section 2169 is in terms made applicable only to the title in which it is found, it should now be confined to the unrepealed sections of that title is not convincing. The persons entitled to naturalization under these unrepealed sections include only honorably discharged soldiers and seamen who have served three years on board an American vessel, both of whom were entitled from the beginning to admission on more generous terms than were accorded to other aliens. It is not conceivable that Congress would deliberately have allowed the racial limitation to continue as to soldiers and seamen to whom the statute had accorded an especially favored status, and have removed it as to all other aliens. Such a construction can not be adopted unless it be unavoidable.

The division of the Revised Statutes into titles and chapters is chiefly a matter of convenience, and reference to a given title or chapter is simply a ready method of identifying the particular provisions which are meant. The provisions of title XXX, affected by the limitation of section 2169,

originally embraced the whole subject of naturalization of aliens. The generality of the words in section 2165, "An alien may be admitted * * *", was restricted by section 2169 in common with the other provisions of the title. The words "this title" were used for the purpose of identifying that provision (and others), but it was the provision which was restricted. That provision having been amended and carried into the Act of 1906, section 2169 being left intact and unrepealed, it will require something more persuasive than a narrowly literal reading of the identifying words "this title" to justify the conclusion that Congress intended the restriction to be no longer applicable to the provision.

It is the duty of this court to give effect to the intent of Congress. Primarily this intent is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail. (See *Church of the Holy Trinity vs. United States*, 143 U. S. 457; *Heydenfeldt vs. Daney Gold etc. Co.*, 93 U. S. 634, 638.) We are asked to conclude that Congress, without the consideration or recommendation of any committee, without a suggestion as to the effect, or a word of debate as to the desirability of so fundamental a change, nevertheless, by failing to alter the identifying words of section 2169, which section we may assume was continued for some serious purpose, has radically modified a statute always theretofore maintained and considered as of great importance. It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national policy by a century of legislative and administrative acts and judicial decisions would have been deprived of its force in such dubious and casual fashion. We are, therefore, constrained to hold that the Act of 1906 is limited by the provisions of section 2169 of the Revised Statutes.

Second. This brings us to inquire whether, under section 2169, the appellant is eligible to naturalization. The language of the naturalization laws from 1790 to 1870 had been uniformly such as to deny the privilege of naturalization to an alien unless he came within the description "free white person". By section 7 of the Act of July 14, 1870 (16 Stats. 254, 256), the naturalization laws were "extended to aliens of African nativity and to persons of African descent." Section 2169 of the Revised Statutes, as already pointed out, restricts the privilege to the same classes of persons, viz., "to aliens [being free white persons and to aliens] of African nativity and persons of African descent." It is true that in the first edition of the Revised Statutes of 1873 the words in brackets, "being free white persons and to aliens", were omitted, but this was clearly an error of the compilers and was corrected by the subsequent legislation of 1875 (18 Stats. 316, 318). Is appellant, therefore, a "free white person," within the meaning of that phrase as found in the statute.

On behalf of the appellant it is argued that we should give to this phrase the meaning which it had in the minds of its original framers in 1790 and that it was employed by them for the sole purpose of excluding the black or African race and the Indians then inhabiting this country. It may be true that these two races were alone thought of as being excluded, but to say that they were the only ones within the intent of the statute would be to ignore the affirmative form of the legislation. The provision is not that

negroes and Indians shall be excluded, but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified. It is not enough to say that the framers did not have in mind the brown or yellow races of Asia. It is necessary to go farther and be able to say that had these particular races been suggested the language of the act would have been so varied as to include them within its privileges. As said by Chief Justice Marshall in *Dartmouth College vs. Woodward*, 4 Wheat. 518, 644, in deciding a question of constitutional construction: "It is not enough to say that this particular case was not in the mind of the Convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception." If it be assumed that the opinion of the framers was that the only persons who would fall outside the designation "white" were negroes and Indians, this would go no farther than to demonstrate their lack of sufficient information to enable them to foresee precisely who would be excluded by that term in the subsequent administration of the statute. It is not important in construing their words to consider the extent of their ethnological knowledge or whether they thought that under the statute the only persons who would be denied naturalization would be negroes and Indians. It is sufficient to ascertain whom they intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded.

The question then is, Who are comprehended within the phrase "free white persons"? Undoubtedly the word "free" was originally used in recognition of the fact that slavery then existed and that some white persons occupied that status. The word, however, has long since ceased to have any practical significance and may now be disregarded.

We have been furnished with elaborate briefs in which the meaning of the words "white person" is discussed with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly the test afforded by the mere color of the skin of each individual is impracticable as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter-hued persons of the brown or yellow races. Hence to adopt the color test alone would result in a confused overlapping of races and a gradual merging of one into the other, without any practical line of separation. Beginning with the decision of Circuit Judge Sawyer, *In re Ah Yup*, 5 Sawy. 155 (1898), the federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race. Among these decisions, see, for example: *In re Camille*, 6 Fed. Rep. 256; *In re Saito*, 62 Fed. Rep. 126; *In re Nian*, 21 Pac. (Utah) 993; *In re Kumagai*, 163 Fed. 922; *In re Yamashita*, 30 Wash. 234, 237; *In re Ellis*,

179 Fed. Rep. 1002; *In re Mozumdar*, 207 Fed. Rep. 115, 117; *In re Singh*, 257 Fed. Rep. 209, 211-212, and *In re Charr*, 273 Fed. Rep. 207. With the conclusion reached in these several decisions we see no reason to differ. Moreover, that conclusion has become so well established by judicial and executive concurrence and legislative acquiescence that we should not at this late day feel at liberty to disturb it, in the absence of reasons far more cogent than any that have been suggested. (*United States vs. Mid-West Oil Company*, 236 U. S. 459, 472.)

The determination that the words "white person" are synonymous with the words "a person of the Caucasian race" simplified the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. The effect of the conclusion that the words "white person" means a Caucasian is not to establish a sharp line of demarcation between those who are entitled and those who are not entitled to naturalization, but rather a zone of more or less debatable ground outside of which, upon the one hand, are those clearly eligible, and outside of which, upon the other hand, are those clearly ineligible for citizenship. Individual cases falling within this zone must be determined as they arise from time to time by what this court has called, in another connection (*Davidson vs. New Orleans*, 96 U. S. 97, 104), "the gradual process of judicial inclusion and exclusion."

The appellant, in the case now under consideration, however, is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side. A large number of the federal and state courts have so decided and we find no reported case definitely to the contrary. These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold.

The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied—either in the legislation or in our interpretation of it—any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

The questions submitted are, therefore, answered as follows:

Question No. 1. The Act of June 29, 1906, is not complete in itself, but is limited by section 2169 of the Revised Statutes of the United States.

Question No. 2. No.

Question No. 3. No.

It will be so certified.

CHAPTER II.—YAMASHITA AND KONO CASE.

TAKUJI YAMASHITA and CHARLES HIO KONO, Petitioners, vs. J. GRANT HINKLE, as Secretary of State of the State of Washington, Respondent.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1921. No. 16567.

1. BRIEF OF PETITIONERS, BY C. S. SHANK.

PETITION FOR WRIT.

To the Honorable the Supreme Court of the United States:

The petition of Takuji Yamashita and Charles Hio Kono respectfully shows to this honorable court as follows:

On the 14th day of May, 1921, these petitioners filed in the supreme court of the State of Washington (being the court having jurisdiction of the person of the defendant and the subject matter of the cause of action hereinafter set forth) their application for a writ of mandate requiring the respondent to accept and file certain articles of incorporation theretofore tendered to the respondent and described in the said application. This application was supported by the affidavit of the petitioners wherein they stated that they were of the Japanese race, but had been duly admitted to citizenship in the United States by a superior court of the State of Washington after all proceedings required in such cases under the naturalization laws of the United States of America had been duly had. Said affidavit further showed that desiring to form a corporation under the laws of the State of Washington, these petitioners had duly executed and tendered to the respondent articles of incorporation of such corporation, but that the respondent had refused to accept and file such articles of incorporation and still refuses so to do upon the claim that these petitioners, being of the Japanese race, were not at the time of their naturalization, and never at any time had been, entitled under naturalization laws of the United States of America to be admitted to citizenship in the United States of America, and were therefore not entitled under the laws of the State of Washington to form such a corporation as these petitioners were attempting to form. The said affidavit further showed that the said respondent was thereby depriving these petitioners of a right of citizenship duly guaranteed to them by the Constitution and laws of the United States of America, and particularly by the Fourteenth Amendment to the Constitution of the United States and the naturalization laws of the United States.

The said respondent thereafter duly appeared in said cause and demurred to the said application and affidavit in support thereof upon the sole and only ground that the said application and affidavit did not contain facts sufficient to constitute a cause of action.

The said cause came duly on for hearing before department two of the supreme court of the State of Washington upon the 20th day of May, 1921, upon the said application and affidavit of these petitioners and the said demurrer of the respondent and the respective briefs of both parties, and thereupon the said application of these petitioners was denied by the said department of said court.

Thereafter and within the time required by the statute of the State of Washington and the rules and practice of the said supreme court of the State of Washington, these petitioners filed their petition for rehearing both before the said department and before the entire court *en banc*, and in the said petition for rehearing these petitioners again raised the claim that by the action of the respondent and of the said court they were being deprived of their right of citizenship guaranteed to them by the Constitution and laws of the United States of America, but the said petition, having been duly considered by the said supreme court of the State of Washington *en banc*, was, by the court on the 28th day of June, 1921, denied, and the said order was a final judgment in the highest court of the State of Washington in which a decision in said matter could or can be had and these petitioners are without remedy unless this honorable court grants this petition for a writ of *certiorari*.

These petitioners further show that the reasons relied upon by them for the allowance of the said writ are that the judgments and orders of the supreme court of the State of Washington, as hereinbefore set forth, deprive these petitioners of a right of citizenship in the United States of America guaranteed to them by the Constitution and naturalization laws of the United States of America and theretofore duly bestowed upon them after due and proper proceedings had in a court having jurisdiction of the subject of naturalization, all of the said proceedings having been had in accordance with the naturalization laws of the United States of America, and further that the said judgments and orders of the supreme court of the State of Washington constitute an adjudication that these petitioners are not citizens of the United States of America in spite of the adjudications theretofore had in the superior courts of the State of Washington as hereinbefore set forth.

These petitioners present herewith as a part of this petition a brief showing more fully their views upon the questions involved, and furnish as an exhibit hereto a certified copy of the entire transcript of record of the case showing all the proceedings of the said supreme court of the State of Washington.

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this court, directed to the supreme court of the State of Washington, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said supreme court of the State of Washington in this case, which was entitled in that court "*Takuji Yamashita and Charles Hio Kono, Plaintiffs, vs. J. Grant Hinkle, as Secretary of State of the State of Washington, Defendant,*" to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the supreme court of the State of Washington may be reversed by this honorable court.

TAKUJI YAMASHITA,
CHARLES HIO KONO,
By CORWIN S. SHANK,
Attorney for said Petitioners.

CORWIN S. SHANK,
Attorney for said Petitioners.

(1) AFFIDAVIT IN SUPPORT OF APPLICATION FOR WRIT OF MANDATE.

State of Washington, County of King, ss.:

Takuji Yamashita, being first duly sworn, on oath deposes and says:

I am one of the above-named plaintiffs and make this affidavit on behalf of myself and my above-named co-plaintiff for the purpose of obtaining a writ of mandate out of this court directed to the above-named defendant J. Grant Hinkle, as secretary of state of the State of Washington, requiring the said defendant to receive and file articles of incorporation of Japanese Real Estate Holding Company heretofore tendered to the said defendant by these plaintiffs as hereinafter set forth; the said defendant is the duly elected, qualified and acting secretary of state of the State of Washington; these plaintiffs are each of them natives of the Empire of Japan, but after all proceedings required under the naturalization laws of the United States of America had been had each of these plaintiffs have been duly naturalized by a superior court of the State of Washington, and have been duly admitted to citizenship in the United States of America by such superior courts, and this affiant is now and for more than ten years last past has been an actual and *bona fide* resident of the State of Washington. Heretofore these plaintiffs, desiring to form a corporation under and pursuant to the laws of the State of Washington to be known as Japanese Real Estate Holding Company, duly made, executed and acknowledged in triplicate articles of incorporation of said Japanese Real Estate Holding Company, a true and correct copy of which articles is hereto attached and marked "Exhibit A," hereby referred to and by this reference made a part of this affidavit, and upon the 5th day of May, 1921, tendered one original copy of such articles so duly executed and acknowledged together with the necessary filing fee to the said defendant and demanded that he accept and file the same, but the said defendant refused to accept and file the same and still refuses so to do upon the claim that these plaintiffs, being of the Japanese race, were not at the time of their naturalization and never at any time have been and are not now entitled under the naturalization laws of the United States of America to be admitted to citizenship in the United States of America and are therefore not entitled under the laws of the State of Washington to form a corporation with sole power of acquiring and holding real estate within the State of Washington, or to file articles of incorporation naming these plaintiffs as sole trustees of the said corporation; thereby the said defendant is depriving these plaintiffs of a right of citizenship duly guaranteed to them by the Constitution and the laws of the United States of America and of the State of Washington, and particularly by the Fourteenth Amendment to the Constitution of the United States and the naturalization laws of the United States, and these plaintiffs have no plain, speedy or adequate remedy in the course of law and therefore herewith make application to this court for a writ of mandate directing and commanding the said defendant to accept and file the said articles of incorporation.

(Signed)

TAKUJI YAMASHITA.

EXHIBIT "A."

Articles of Incorporation of Japanese Real Estate Holding Company.

ARTICLES OF INCORPORATION.

Article I.

The name of this corporation shall be Japanese Real Estate Holding Company.

Article II.

The objects and purposes for which this corporation is formed are and

shall be: To buy and otherwise acquire, own, hold, develop, improve, manage, sell, convey, transfer and lease and dispose of real estate of every nature and description within the State of Washington.

Article III.

The capital stock of this corporation shall be ten thousand dollars, divided into one hundred shares of the par value of one hundred dollars each.

Article IV.

The time of the existence of this corporation shall be fifty years.

Article V.

The principal place of business of this corporation shall be Seattle, King County, Washington.

Article VI.

The number of trustees of this corporation shall be two, and the names of those of the trustees who shall manage the concerns of the corporation until the 5th day of September, 1921, shall be Takuji Yamashita and Chas. Hio Kono.

In witness whereof, the said Takuji Yamashita and Chas. Hio Kono have hereunto set their hands and seals in triplicate this 5th day of April, 1921.

TAKUJI YAMASHITA, (Seal.)

CHAS. HIO KONO. (Seal.)

(2) DEMURRER.

(Stamp.) Filed in supreme court of Washington May 16, 1921. C. S. Reinhart, Clerk. F. S. G.

Comes now the defendant and demurs to the application for writ of mandate, and the affidavit in support of such application, and each of them, in the above-entitled case, for the reason that such application and affidavit do not contain facts sufficient to constitute a cause of action.

(Signed) L. L. THOMPSON,
Attorney-General,
NAT. U. BROWN,
Attorneys for Defendant.

Office and postoffice address: Temple of Justice, Olympia, Washington.

(Stamp.) Copy hereof received this May 13, 1921. Shank, Belt & Fairbrook.

(3) BRIEF OF PLAINTIFFS.

(Stamp.) Filed in supreme court of Washington May 19, 1921. C. S. Reinhart, clerk. F. S. G.

It is not the desire of the plaintiffs here to enter into any extended arguments on the merits of this case. It is apparent in the case of *In re Yamashita*, 30 Wash. 234, which, so far as we know, has never been modified by this court nor overruled by the United States courts, that the view of this court is that Yamashita is not a citizen of the United States. Inasmuch as the same conclusion would undoubtedly have been reached with respect to Kono, it is apparent, unless we could convince the court that the decision in 30 Washington was erroneous, no good purpose would be subserved by extended argument.

It is the desire, however, of counsel with whom counsel for plaintiffs in this action are associated to present this matter to the Supreme Court of the United States, and inasmuch as we entertain no hope of changing the court's view as to the correctness of the decision in *In re Yamashita*

we desire to submit the case on the brief of counsel for applicant in that case, and without citation of further authority.

In support of the petition herein the court is respectfully referred to the case of *In re Rodriguez*, 81 Fed. 337.

We respectfully wish to request the court, however, that as early a decision be rendered on the petition herein as the business of the court will permit of.

Respectfully,

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiffs.

(4) DEFENDANT'S POINTS AND AUTHORITIES.

(Stamp.) Filed in supreme court of Washington May 19, 1921. C. S. Reinhart, clerk. F. S. G.

The plaintiffs herein are applying to this court for writ of mandamus directed against J. Grant Hinkle as secretary of state, requiring him to receive and file articles of incorporation of a certain Japanese real estate holding company of which they are the incorporators. In the affidavit and in the proposed articles of incorporation the plaintiffs recite that they are both natives of Japan and have been duly naturalized citizens of the United States. The defendant has demurred to the application and affidavit and the matter comes on to be heard upon that demurrer.

The sole question involved is whether these plaintiffs are citizens of the United States. It may be conceded by the defendant that these plaintiffs are in possession of citizenship papers issued by the superior court of Pierce County in May, 1902. The contention of the defendant is that the order of the superior court admitting these plaintiffs to citizenship was void and of no effect.

The question is not an open one in this state, having been decided adversely to these plaintiffs in *In re Yamashita*, 30 Wash. 234. In that case one of these plaintiffs sought admission to the bar of the State of Washington. This court held that the judgment of the superior court admitting him to citizenship shows upon its face that the court was without authority and such judgment may be attacked at any time and in any proceeding. It further held that the right of naturalization being restricted to free white persons, to aliens of African nativity and to persons of African descent, a native of Japan would not be entitled to citizenship.

The purpose of this action is to obtain a later adjudication of the matter by this court so that the question may be presented to the Supreme Court of the United States upon a writ of error. Upon the authority of the *Yamashita* case the writ should be denied.

Respectfully submitted,

(Signed) L. L. THOMPSON,
Attorney-General,
NAT U. BROWN,
Attorneys for Defendant.

Office and postoffice address: Temple of Justice, Olympia, Washington.

(5) ORDER.

Friday, May 20, 1921. (Stamped.) Filed in supreme court of Washington. C. S. Reinhart, clerk. F. S. G.

It is by the court ordered that the petition for mandamus in the above-entitled cause be, and the same is hereby, denied.

(6) PETITION FOR REHEARING.

(Stamp.) Filed in supreme court of Washington June 9, 1921. C. S. Reinhart, clerk. F. S. G.

Come now the above-mentioned plaintiffs, Takuji Yamashita and Charles Hio Kono, and respectfully petition this court for a rehearing either before the department that heard the said application, or before the entire court *en banc*, as to the court shall seem proper. The petition is made upon the following grounds, to-wit:

The decision of the department herein denying the writ of mandamus asked for herein deprives these plaintiffs of a right of citizenship guaranteed to them by the Constitution and laws of the United States of America, and the State of Washington, and particularly by the Fourteenth Amendment to the Constitution of the United States, and the naturalization laws of the United States.

Respectfully submitted,

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiff.

(7) EN BANC.

Order: Tuesday, June 28, 1921. (Stamp.) Filed in supreme court of Washington. C. S. Reinhart, clerk. F. S. G.

The petition for rehearing in the above-entitled cause having been heretofore submitted to the court, and the court having fully considered the same, and being fully advised in the premises, it is now by the court ordered that the said petition be, and the same is hereby, denied.

(8) JUDGMENT.

This cause having been heretofore submitted to the court upon the petition of the plaintiffs for a writ of mandamus to compel the respondent to receive and file the articles of incorporation of the Japanese Real Estate Holding Co., and upon the argument of counsel, and the court having fully considered the same, it is now here ordered and adjudged that the petition be, and the same is hereby, denied and that the said J. Grant Hinkle, as secretary of state, have and recover of and from the said Takuji Yamashita and Charles Hio Kono the costs of this action taxed and allowed at fifteen dollars, and that execution issue therefor.

STATEMENT OF THE CASE.

The petitioners in this case are of the Japanese race, but were duly naturalized in superior courts of the State of Washington. Desiring to exercise a right of citizenship, they sought to form a corporation, but the respondent refused to accept the tendered articles of incorporation upon the sole ground that in spite of their certificates of naturalization he did not consider them citizens of the United States and concluded that they were therefore not eligible to form the corporation which they were endeavoring to form. Thereupon the petitioners made application to the supreme court of the State of Washington for a writ of mandate directed to the respondent to compel him to accept and file such articles of incorporation. The respondent demurred to the application and supporting affidavit of these petitioners, thereby admitting the facts as hereinabove set forth. Upon the hearing the only question advanced by both parties was the question of whether the petitioners were citizens of the United States and the supreme court of the State of Washington refused the application, and to review the final order refusing this application these petitioners now petition this honorable court for a writ of *certiorari*.

ASSIGNMENT OF ERROR.

These petitioners respectfully submit that under the facts stated they are citizens of the United States of America and are entitled to all the rights and privileges of such citizens and that the judgments and orders of the supreme court of the State of Washington deprive them of such rights.

ARGUMENT.

THE STATUTES OF THE CASE.

The decision of this case depends upon the interpretation of three paragraphs of the federal statutes as follows: "Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner * * *." (Revised Statutes, sec. 2165.)

"Sec. 2169. The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent." (Revised Statutes, sec. 2169.)

"Sec. 14. That hereafter no state court, or court of the United States, shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed." (22 Stat. L. 58, chap. 126, sec. 14.)

These three provisions have resulted in one of the most curious mazes of legal interpretation of any statutes ever passed. The first quoted section is expressly inclusive of all aliens. The second quoted section extends naturalization to "free white persons" and persons of African nativity or descent. The third statute denies citizenship to Chinese and expressly repeals "all laws in conflict with this act." The second section, 2169, includes classes of persons that were already included in section 2165 and section 14 excludes a class of persons that were included in section 2165 but were not included in section 2169. Such a conflict of provisions cannot help but result in the hopeless maze of decisions that have resulted and must continue a puzzle to the naturalization courts of this country until this court renders its authoritative decision thereon.

THE CONFLICT IN THE DECISIONS ON THIS QUESTION.

Before the decision *In re Yamashita*, 30 Wash. 234, Japanese were frequently admitted without question in many of the Western courts, and among the Japanese so admitted were these two petitioners. Whether they were admitted upon the court's interpretation of the statute to mean that persons of all races except Chinese were admissible or whether the court took judicial notice of the fact that the Japanese race was predominantly Caucasian, or whether the court found that these particular Japanese were as a matter of fact free white persons, does not appear, but it does appear that the court admitted these petitioners to citizenship.

In 1894 Circuit Judge Colt in the circuit court of the District of Massachusetts in the case of *In re Saito*, 62 Fed. 126, decided that a Japanese was not admissible to citizenship, founding his opinion chiefly upon various statements found in the debates of Congress at the time of the passage of the act, and ethnological classifications by various textbook writers who may never have seen a member of the Japanese race and whose writings may never have been read by a single member of Congress who passed the act. This decision in so far as the Japanese are concerned has been blindly followed by the only subsequent decisions which appear in the reports, apparently without any independent investigation as to the proper ethnological classification of the Japanese race. (*In re Kumagai*, 163 Fed. 922 D. C. W. D. Wn. N. D.]; *In re Yamashita*, 30 Wash. 234; *In re Narasaki*, 39 Fed. 643 [D. C. S. D. N. Y.])

All of these decisions assume as a matter of judicial notice that a Japanese is a Mongol and follow the interpretation of the statute laid down in *In re Saito* that section 2169, under the theory of *expressio unius est exclusio alterius*, excludes all but white and black and entirely ignore the same theory when it comes to interpreting the clause of the statute excluding Chinese and repealing all laws in conflict therewith.

The next time these provisions came up for interpretation in relation to an Asiatic was in the case of *In re Knight*, 171 Fed. 299, wherein the district court of the Eastern District of New York decided that an applicant whose father was an Englishman and whose mother was one-half Chinese and one-half Japanese was not white enough to be admitted, but immediately thereafter a Syrian making application for admission in the case of *In re Najour*, 174 Fed. 735 (C. C. N. D. Ga.), the circuit court for the Northern District of Georgia ignored the aforesaid debates in Congress to the effect that all Asiatics must be excluded and, following a more modern authority on ethnology, took judicial notice of a work by A. H. Keane to the effect that a Syrian was a white man, and also finding, from inspection, that the applicant "was not particularly dark," concluded that he was therefore entitled to admission.

Almost simultaneously therewith, in *In re Halladjian*, 174 Fed. 834 (C. C. D. Mass.), Judge Lowell decided that four Armenians were white enough to be admitted by reason of the fact that both historical and modern ethnological authorities agree that Armenians had a considerable proportion of white blood in them and that the applicants were no darker than many other applicants that had been admitted in the same court. This decision was followed in the case of Syrians in *In re Mudarri*, 176 Fed. 465 (C. C. D. Mass.), and in the district court for the District of Oregon in *In re Ellis*, 179 Fed. 1002.

Next comes the case of a Parsee from Bombay in *In re Balsara*, 171 Fed. 294 (C. C. S. D. N. Y.), and *U. S. vs. Balsara*, 180 Fed. 694 (C. C. A. 2nd Cir.). This applicant was admitted by the circuit court of the Southern District of New York upon the express grounds that a satisfactory interpretation of the statute was impossible and as the Government was prepared to appeal from an order admitting the applicant to citizenship such an order should be entered in order to obtain a ruling by the circuit court of appeals. The circuit court of appeals for the Second Circuit held that the term "free white person" meant Caucasian regardless of the shade of white, and further took judicial notice of an immigration of Parsees from Persia into India supposed to have happened some 1200 years ago, and accordingly concluded that a Parsee was entitled to naturalization.

A Filipino was decided not to be a white person in *In re Alverto*, 198 Fed. 688 (D. C. E. D. Pa.); *In re Lampitoe*, 232 Fed. 382 (D. C. S. D. N. Y.); *In re Mallari*, 239 Fed. 416 (D. C. D. Mass.), and *In re Rallos*, 241 Fed. 686 (D. C. E. D. N. Y.); but was declared worthy of citizenship in *In re Bautista*, 245 Fed. 765 (D. C. N. D. Cal.).

In *In re Akhay Kumar Mozumbdar*, 207 Fed. 115 (D. C. E. D. Wn.), Judge Rudkin accepted the testimony of a Hindu to the effect that he was a white man and accordingly ordered him admitted to citizenship.

The opposite conclusion regarding a Hindu was reached by Judge Dickerson in the district court for the Eastern District of Pennsylvania in *In re Sadar Bhagwab Singh*, 246 Fed. 496, who disregarded ethnological classifications and drew the color line closely, and concluded that inasmuch as the Hindu before him was not white he was not admissible.

In the cases, however, of *In re Mohan Singh*, 257 Fed. 209 (D. C. S. D. Cal.), and of *In re Bhagat Singh Thind*, 268 Fed. 683 (D. C. Ore.), the courts concluded that the Hindu was eligible to citizenship, the decision in the latter case being based upon what the judge considered the weight of authority.

Koreans were refused admission in the *Petition of Easurk Emsen Charr*, 273 Fed. 207 (D. C. W. D. Mo.), and in *In re En Sk Song*, 271 Fed. 23 (D. C. S. D. Cal.).

This, we believe, is the complete list of the reported cases on the question of the admissibility of Asiatics to citizenship in the United States. Only two of these cases came to a circuit court of appeals, the state courts in the meantime having been busy admitting and refusing applicants without their opinions being reported, each judge following his own ideas as to whether the applicant was admissible or not. It will be seen that some judges follow classifications laid down by authors who were dead before Japan was open to foreigners and who perhaps never saw a member of the Japanese race or even talked with anyone who had seen a member of the Japanese race. Some judges passed upon whether the applicant was white by personal inspection; some by listening to the applicant's statement as to his ancestors; some by searching through ancient history and weighing the probabilities of whether the Mongol or the Caucasian was predominant in the race. Every conceivable method of deciding this matter has been adopted by various courts and will continue to be adopted until this court furnishes some definite rule to be followed. In the meantime, either many applicants are admitted to citizenship who are not entitled under the statute to be admitted, or many persons who are lawfully resident in this country, whose children are citizens, who are themselves anxious to become citizens and would make good citizens, are unwillingly deprived of their right by reason of the fact that back in 1781 an individual named Blumenbach compiled a classification of mankind in which he declared a Japanese to be a Mongol and this classification has since been followed by various trial courts.

THE TRUE INTERPRETATION OF THESE STATUTES.

As we have said before, a consistent application of the maxim *expressio unius est exclusio alterius* would if applied consistently bring us to the conclusion that the Japanese are admissible. Section 2169 as originally passed applied the title to Africans. An interpretation that only Africans were admissible to citizenship would be ridiculous, but nevertheless, to save the question, this was corrected so as to make the section read as hereinbefore set forth. But if only whites and blacks are admissible to citizenship what was the reason for the Act of 1882 forbidding the admission of Chinese? It can only be explained upon the theory that Congress concluded the Chinese admissible and intended to forbid the admission of Chinese and Chinese only. Therefore the application of this maxim *expressio unius est exclusio alterius* to the statutes would render Japanese admissible. Reference to the debates of Congress brings us nowhere because at that time there was no idea of an influx of Japanese, or Syrians, or Hindus, or any Asiatics excepting the Chinese, and the Chinese are effectually barred by the Act of 1882. Debates in Congress were considered when it was a question of admitting Japanese, but were ignored when it came to admitting other Asiatics.

What, then, did Congress mean by section 2169? The answer is contained in an historical fact which is well illustrated in the next title of the Revised Statutes relating to the census. Congress had in mind a

classification of but three classes—white, black and Indians. Indians were disregarded in the Naturalization Act because they were in the peculiar situation of being neither citizens nor aliens, but “wards of the Government.” Blacks were cared for by extending the privilege of naturalization to them. Section 2165 extended the right of naturalization to any alien, and the correction of section 2169 made it certain that no white person would be excluded. What reason is there to believe that Congress thereby intended to exclude Japanese any more than there is to believe that Congress intended to exclude whites when the original Revised Statutes were enacted?

In the succeeding title of the Revised Statutes, being title XXXI, relating to the census, section 2176, provides for the enumeration of all inhabitants, omitting from the enumeration of inhabitants “Indians not taxed,” while section 2206 described the schedules of this enumeration, and one of the classifications in the schedules is “Color: White, black or mulatto.” This is the classification made by Congress of inhabitants of this country. No one can claim that it is scientific or that it is accurate, but it is the one distinction of color and the only distinction in which Congress was interested at that time. Their classification was white and black. That embraced all mankind and their extension of the privilege of naturalization to whites and Africans was intended to cover the world.

The decisions which we have cited assume that a member of the Japanese race was a Mongolian. This assumption in the earlier decisions was expressly based upon the classifications of theorists of the eighteenth century and the early part of the nineteenth century. These theories were promulgated when Japan was a closed country. Later authorities have thrown a doubt upon this classification and have rendered it not impossible that a member of the Japanese race could be considered at least a member of the Aryan or Caucasian race. We will not burden this court with lengthy extracts from these authorities, but ask this court’s indulgence for the privilege of showing this fact hereafter.

We submit that we have shown that the decisions upon the admission of Asiatics to citizenship are, owing to the obscurity of the statute law and the general difficulty of the matter, hopelessly at variance with each other, and that each judge holding a naturalization court at present follows the dictates of his own judicial discretion in a matter that should follow an absolutely certain rule. We would therefore respectfully ask that the petitioners’ petition for a writ of *certiorari* be granted to the end that this matter, which is of great importance to the country, should be finally and authoritatively settled.

Respectfully,
CORWIN S. SHANK,
Attorney for Petitioners.

IN THE UNITED STATES SUPREME COURT.

(OCTOBER TERM, 1922, No. 177.)

2. BRIEF FOR PETITIONERS, BY GEORGE W. WICKERSHAM.
STATEMENT.

This petition was granted to review a judgment rendered by the supreme court of Washington refusing a writ of mandamus to compel the respondent, the secretary of state of the State of Washington, to receive and file articles of incorporation of the Japanese Real Estate Holding Company, prepared and executed in conformity with the General Corporation Laws of the state,

relating to the organization and the management of private corporations, for the sole reason that the petitioners, the incorporators named in said articles of incorporation, are both natives of Japan, although duly naturalized citizens of the United States.

A stipulation filed by counsel sets forth:

"The sole question involved is whether these plaintiffs are citizens of the United States. It may be conceded by the defendant that these plaintiffs are in possession of citizenship papers issued by the superior court of Pierce County in May, 1902. The contention of the defendant is that the order of the superior court admitting these plaintiffs to citizenship was void and of no effect." (Rec., p. 7.)

The action of the defendant was based upon a decision of the supreme court of the State of Washington in the case of *In re Yamashita*, 30 Wash. 234. In that case one of these plaintiffs sought admission to the bar of the State of Washington. The supreme court held that the judgment of the superior court admitting him to citizenship showed upon its face that the court was without authority, and that such judgment might be attacked at any time and in any proceeding. It further held that the right of naturalization, being restricted to free white persons, to aliens of African nativity, and to persons of African descent, a native of Japan was not entitled to citizenship (Rec., p. 7).

The sole question involved on this appeal, therefore, is whether or not the state court, in naturalizing the two petitioners, acted without jurisdiction, because (1) its jurisdiction was limited to the naturalization of (a) free white persons, (b) aliens of African nativity and (c) persons of African descent; and (2) because a native of Japan does not fall within any of these categories.

ASSIGNMENT OF ERROR.

Petitioners submit that the supreme court of the State of Washington erred in holding that the superior court of Washington was without jurisdiction to naturalize these petitioners, and that these petitioners were not "free white persons" within the meaning of the act of Congress applicable to naturalization.

ARGUMENT.

A. JUDICIAL AUTHORITIES.

The statute in force at the time of the issue of certificates of naturalization to these petitioners was title XXX of the U. S. Revised Statutes, entitled "Naturalization," enacted in 1873-4, as amended by the Act of February 18, 1875, 18 Stat. 316, and as revised in 1878. Prior to the Revised Statutes, the various acts of Congress providing for naturalization, beginning with the first act, namely, that approved March 26, 1790 (1 Stat. 103), provided for the naturalization of "any alien, being a free white person," who should meet the requirements of the act. (See also Act of January 29, 1795, 1 Stat. 414; Act of April 14, 1802, 2 Stat. 153, as supplemented by Act of May 26, 1824, 4 Stat. 69.) Certain exceptions to this limitation were contained in acts providing for the naturalization of "any alien" who should have served in the Army or Navy, or as a seaman on a merchant ship of the United States (see Act of July 17, 1862, 12 Stat. 594. 597; Act of June 7, 1872, 17 Stats. 262, 268).

By an act passed July 14, 1870 (16 Stats. 254), it was provided "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

In the codification of the statutes into the first revision, enacted 1873-4

the words "being a free white person," were dropped out of the first section in title XXX dealing with naturalization, and a section, numbered 2169, was inserted, reading:

"The provisions of this title shall apply to aliens of African nativity and to persons of African descent."

On February 18, 1875, an act (18 Stat. 316) was passed to correct errors and supply omissions in the Revised Statutes, which amended section 2169 by inserting, in the first line after the word "aliens," the words "being free white persons, and to aliens" (p. 318), so that the section thereafter should read:

"The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

Between December 31, 1873, and February 18, 1875, therefore, there was no restriction whatever respecting race, origin or color of applicants for naturalization, and during this period it was held that Chinese were eligible to citizenship. (*In re Ah Yup*, 5 Sawyer 155, Fed. Cas. No. 104; *In re Ah Chong*, 2 Fed. 733, 739.)

The general law applicable to naturalization, aside from the exceptional cases of seamen and soldiers, remained unchanged in applying only to aliens being white or of African nativity or of African descent until after the issuance of citizenship papers to the petitioners in May, 1902. As it is admitted that the petitioners were not of African nativity or of African descent, the question arises whether, being natives of Japan, they come within the general description of "free white persons," within the meaning of the statute. These words for years have given rise to great confusion in their interpretation by the circuit and district courts of the United States.

Circuit Judge Lowell, in admitting to naturalization a Syrian, born in Damascus, as a "white" person, held that cases of difficulty were likely to arise in construing section 2169, unless its wording be changed, and the intent of Congress made to appear. *In re Mudarri*, 176 Fed. 465, that section, he said:

"implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied under section 2169 without making distinctions which Congress certainly did not intend to draw; *e. g.*, a distinction between the inhabitants of different parts of France. Thus, classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first Naturalization Act was passed, *viz.*, any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statute will make quite clear the meaning of the word 'white' in section 2169" (p. 467).

The hope thus expressed has not been realized, and Congress has done nothing to clarify the meaning of the phrase "white person" in the naturalization law, even in the general revision of that law enacted in 1906 or the amendment of 1918. That in 1790, when the first act was passed, the inten-

tion of Congress was to discriminate between the negroes, persons of African birth or descent, on the one hand, and all other immigrants coming to the country, would seem to be obvious. In a very learned and closely reasoned opinion by Circuit Judge Lowell, *In re Halladjian*, 174 Fed. 834, the learned judge says (p. 841):

"If we pass from racial speculation and remote history to the usage of the colonies and of the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattoes, Indians and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes and Indians; that of 1774 as whites, blacks and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790, 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic.' (P. 80.) Here, again, 'white' is made to include all persons not otherwise specified.

"The Census Act of 1790 (Act March 1, 1790, c. 2, 1 Stat. 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by 'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the Government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St., sec. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 319, sec. 9, 25 Stat. 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses,' (Eleventh Census, part I, p. xciv.) In fact, the classification was not

uniform in all parts of the country. Census Act March 3, 1899, c. 419, sec. 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese and Japanese. In other instances 'colored,' as opposed to 'white,' was used to include negroes, Chinese, Japanese, and Indians. Throughout the chapter cited in the above-mentioned bulletin it is assumed that all persons not classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes, requiring separate accommodation in travel. A statute of Arkansas requires separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' (Acts 1891, p. 17, c. 17, sec. 4. See, also, Laws Fla., 1909, p. 39, c. 5893; Acts Va. 1902-1904 [Extra Sess.], p. 987, c. 609, subc. 4 [Code 1904, sec. 1294d]; Civ. Code S. C. 1902, sec. 2158.) Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, sec. 1231; Ky. St. 1909 (Russell's), secs. 5607, 5608, 5642, 5765 (Ky. St. 1909, secs. 4523, 4524, 4428, 4487). The recent constitution of Oklahoma (article 23, sec. 11) reads as follows:

"'Whenever in this constitution and laws of this state the words "colored" or "colored person," "negro" or "negro race" are used, the same shall be construed to mean to apply to all persons of African descent. The term "white race" shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the Government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the Act of 1790 Congress did not concern itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classed as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

As a result of his consideration of the subject, the learned judge found that there is no European or white race, and no Asiatic or yellow race, which includes substantially all the people of Asia; that Armenians had

always been reckoned as Caucasians and white persons. and he concluded as follows:

"We find, further, that the word 'white' has generally been used in the federal and in the state statutes, in the publications of the United States, and in its classification of its inhabitants, to include all persons not otherwise classified; that Armenians, as well as Syrians and Turks, have been freely naturalized in this court until now, although the statutes in this respect have stood substantially unchanged since the First Congress; that the word 'white,' as used in the statutes, publications, and classification above referred to, though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians. Congress may amend the statutes in this respect. To provide more specifically what persons may be admitted to citizenship seems desirable. While the statutes are unchanged, without proof, if proof be admissible, that the meaning of the word 'white' has been still further narrowed, this court will not deny citizenship by reason of their color to aliens who, like the Armenians, have hitherto been granted it."

Judge Maxey, in the district court in Texas, in May, 1897, holding that native citizens of Mexico were eligible to American naturalization, said:

"Indeed, it is a debatable question whether the term 'free white person,' as used in the original Act of 1790, was not employed for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country." (*In re Rodriguez*, 81 Fed. 337.)

He held that while, if the strict scientific classification of the anthropologists should be adopted, the Mexican petitioner probably would not be classed as white, he certainly was not a person of African descent, and referring to the treaty of 1848 with Mexico and the various statutes regarding naturalization of Mexican inhabitants of the territory ceded to the United States, he reached the conclusion that a Mexican was to be considered as a "free white person" within the meaning of the act of Congress.

Judge Bledsoe, in the Southern District of California (*In re En Sk Song*, 271 Fed. 23); Judge Newman, in the Northern District of Georgia (*In re Najour*, 174 Fed. 735); Judge Wolverton, in the District of Oregon (*In re Ellis*, 179 Fed. 1002), and Judge Lowell, in the District of Massachusetts (*In re Muddari*, 176 Fed. 465), have all held that a Syrian was a "white person," within the meaning of the act of Congress, and therefore entitled to naturalization, although disagreeing in the reasoning by which this result was reached.

In *Dow vs. U. S.*, 226 Fed. 145, the circuit court of appeals for the Fourth Circuit, overruling the district judge, who had held that "free white persons" included only aliens of European nativity or descent, and holding a Syrian entitled to naturalization, said, per Woods, C. J., that whatever the general understanding of the term in 1790 might have been, there was no doubt that the meaning had been broadened at the time of the various amending and codifying acts, and that at the time of the amendment of 1875, "the generally received opinion was that the inhabitants of a portion of Asia, including Syria, were to be classed as white persons."

The learned judge said that doubtless when the first act was passed in 1790 it "was intended mainly to provide for naturalization of aliens from Europe, and to deny naturalization to negroes. With other peoples this country had little intercourse and little concern. Accordingly the records of Congress indicate that the debates on the bill of 1790 related to European immigration. It is reasonably certain that congressmen had no knowledge of Blumenbach's classification of the races of men published in 1781, in

which he makes one of the divisions the white or Caucasian race and includes in it 'the western Asiatics on this side of the Caspian Sea and the Ganges'; for his work was not translated from the German and published in English until 1807. The science of ethnology had made little advance in 1790, and the notion of racial division and the meaning of the term 'white' in a comprehensive sense as applied to men were probably quite vague and indefinite in the minds of legislators. Yet in not mentioning the people of Europe, and in extending the privilege of naturalization to any 'free white person,' it seems reasonable to think that the Congress must have believed that there were white persons natives of countries outside of Europe. The writers on the subject of that day, to say the least, were not agreed in the view that Europeans were the only white people" (p. 146).

The court then pointed out the progress of the science of ethnology, and stated that even if the Congress of 1790 considered that the law of that year would be understood to allow the naturalization of persons of European nativity or descent only, the legislators of later years could not have supposed that the term "free white persons" would carry that restricted meaning; and that at the date of the amendment of 1875, it would seem to be true beyond question that the generally received opinion was that the inhabitants of a portion of Asia, including Syria, were to be classed as white persons.

Judge Wolverton, in *In re Ellis*, 179 Fed. 1002, expressed the opinion that the words "'free white persons' are devoid of ambiguity and are of plain and simple signification"—which is rather extraordinary in view of the varying opinions expressed by other judges.

Judge Newman, in the *Najour* case (174 Fed. 735), held that Syrians belonged to the white or Caucasian race, or to "what we recognize and what the world recognizes as the white race." On the other hand, in two learned opinions, Judge Smith, in the District of South Carolina, held that Syrians were not entitled to naturalization, and could not be considered as "free white persons" within the meaning of the Naturalization Acts. (*In re Dow*, 211 Fed. 486; on reargument, 213 Fed. 355.) The opinion in 211 Federal is a thorough and learned summary of the question in the light of the modern science of ethnology. He rejected, in accordance with the great weight of authority under the decisions of this country, the proposition that the words "free white persons" as applied to an applicant were to be determined by *ocular* inspection by the court. He also rejected the definition as a *racial* designation, saying:

"If racial, is anyone entitled to be admitted who belongs to a nation that speaks one of the languages spoken by the peoples heretofore denominated Caucasian, whether or not his color be the very reverse of white. This would mean the admission of all the mixed Asiatic races which speak a tongue the descendant of one of the so-called Indo-European tongues, whether that tongue may have been forced upon them or inherited by a very mixed transmission in point of race. The dark-colored, in fact, almost black, inhabitants of Ceylon, speak the Singhalese language, which is one of the dialects of that branch of the ancient Indo-European language known as Sanscrit, and the dark-colored inhabitants of the Persian Gulf or Persian Coast speak a tongue which appears to be the descendant of the ancient Iranian" (p. 487).

He adopted what he termed the *geographical* definition, namely, that the word "white", as used in the statute, referred to the peoples who were then commonly known in this country as the peoples inhabiting Europe, and whose descendants at the time of the passage of the Act of 1790 formed the inhabitants of the United States, excluding from such consideration the African descendants who were then slaves.

On reargument, he pointed out that ethnologists and philologists do not agree as to who are the white races.

"They will rank different peoples as 'Aryans' or 'Indo-Europeans' or 'Semites' or 'Hamites,' differing even as to who are included in these; but when it comes to 'white' no agreed classification exists. The term white is generally joined to some other by the word 'or,' viz., Aryans or white races, etc." (213 Fed. 360.)

After a review of the history of the races, he concludes that it is a matter of futile speculation.

"The broad fact remains," he says, "that the European peoples taken as a whole are the fair-skinned or light-complexioned races of the world, and form the peoples generally referred to as 'white' and so classed since classification based on complexion was adopted. *All of which foregoing discussion may seem wholly out of place in a reasoned legal opinion as to the construction of a statute, except as illustrating the Serbonian bog into which a court or judge will plunge that attempts to make the words 'white persons' conform to any racial classification.*" (213 Fed. 364.)

The real question, he concluded, was:

"What does the statute mean, to whom did the terms 'free white persons' refer in 1790, in the understanding of the makers of the law?"

A consideration of this question (see pp. 365-6) led him to the conclusion that the test is mainly one of geography.

"Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them? If he is, he is entitled to naturalization if he be otherwise fit for it. If he is not, if he is an Asiatic, whether Chinese, Japanese, Hindoo, Parsee, Persian, Mongol, Malay, or Syrian, he is not entitled to the privilege of naturalization, no matter what his fitness otherwise may be" (213 Fed. 366).

In contrast with Judge Smith's conclusion, Judge Bledsoe, in the district court for the Southern District of California (*In re Mohan Singh*, 257 Fed. 209), and Judge Rudkin, in the Eastern District of Washington (*In re Akhay Kumar Mozumdar*, 207 Fed. 115), held that high caste Hindoos were entitled to naturalization, being members of the Aryan race.

Judge Bledsoe, reviewing the history of the Naturalization Act, says:

"There is nothing that I can discover to indicate anywhere that either the colonies originally or the United States Government later, when the federal statute was first passed, had in mind the exclusion from citizenship of any other persons than those referred to, to wit, negroes, Indians, and unfree whites" (257 Fed. 211).

He held that the terms "white" and "Caucasian" were interchangeable, and that the preponderance of opinion includes Hindoos of India as members of the Aryan branch or stock of the so-called Caucasian or white race.

Judge Rudkin, in the Mozumdar case, held that whatever the original intent might have been, "it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

This intent he infers, not from any contemporary evidence, but wholly from decisions in the courts of the United States, the earliest of which is that of Judge Sawyer, in the Ah Yup case, decided 1878 (5 Sawyer 155). On the other hand, Judge Dickinson, in the district court for the Eastern District of Pennsylvania, held that a Hindoo was not entitled to naturalization. (*In re Sadar Bhagwab Singh*, 246 Fed. 496.) He rejected the test of ocular inspection of color and the test of philological or eth-

nological authority. The general idea of his opinion seems to be that Congress had a certain notion in the use of the term "free white persons," which did not originally include even members of the Latin races, but which gradually was expanded to embrace French, Spanish, Portuguese, and others, and even Hebrews. This he termed the historical interpretation. He says that this term means "that Congress chose its word for the purpose of describing, so far as could be done, although in very general terms, and therefore vaguely, the class the members of which might enjoy the privilege of citizenship and imposed upon the courts the duty of determining whether the individual applicant belonged to that class. Its further and final meaning, with which we are now concerned, is that the courts may admit to citizenship any person found to belong to that designated class, but no power, except that of Congress, can enlarge that class" (p. 499).

It is a little difficult to follow this reasoning, because the judge, himself, does not seem to have a very clear idea about it. In general, it would seem to be his idea that the term embraced those different kinds of peoples who, from time to time, according to the general popular opinion, were regarded as the kind of people who ought to be made citizens of the United States. They were to be considered "white," if at the moment there was no general prejudice against them. They were not "white," if at the time there was a general public feeling that they were not desirable. This is perhaps an extreme interpretation, and yet no more exact rule would seem to be deducible from Judge Dickinson's reasoning.

A Parsee merchant was admitted to naturalization by Judge Lacombe in the Southern District of New York (*In re Balsara*, 171 Fed. 294), and his order affirmed by the circuit court of appeals (180 Fed. 694). Judge Ward, in writing the opinion of the circuit court of appeals, rejects the historical interpretation and holds that Congress intended by the words "free white persons" to confer the privilege of naturalization upon members of the white or Caucasian race only. "Doubtless," he says, "congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term 'Caucasian race' mentioned in some of the foregoing decisions. They probably had principally in mind the exclusion of Africans, whether slave or free, and Indians, both of which races were and had been objects of serious public consideration. The adjective 'free' need not have been used, because the words 'white persons' alone would have excluded Africans, whether slave or free, and Indians. Still effect must be given to the words 'white persons.' The congressmen certainly knew that there were white, yellow, black, red and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we cannot believe he would have been excluded on the ground that he was not a white person, and, if a Parsee had applied, the court would have had to determine then, just as the circuit court did in this case, whether the words used in the act did or did not cover him" (p. 695).

What a court would have done at that time if a Mexican or a Syrian were to have applied is not considered, but the court adopted squarely the classification of races by color, and considered the Parsee as included in the white race.

Judge Colt, in the District of Massachusetts in June, 1894 (*In re Saito*, 62 Fed. 126), held that a native of Japan, whom he denominated as of the Mongolian race, was not entitled to naturalization. He considered the words

"white persons," which were incorporated in the naturalization laws as early as 1802, saying:

"At that time the country was inhabited by three races, the Caucasian or white race, the negro or black race, and the American or red race. It is reasonable, therefore, to infer that when Congress, in designating the class of persons who could be naturalized, inserted the qualifying word 'white,' it intended to exclude from the privilege of citizenship all alien races except the Caucasian."

This definition would lead to an inquiry as to the origin of all the peoples inhabiting the United States in 1802, and members of all nationalities or races then here who were not red or black would become eligible to naturalization. A perhaps stronger argument against the petitioners was advanced by Judge Colt in referring to the history of the Act of 1870 extending the privilege of citizenship to colored persons, and the proposal of Charles Sumner in 1870 to strike the word "white" from the naturalization statute, which was opposed upon the ground, among others, that the omission of this word would operate to extend naturalization to all classes of aliens and especially to Asiatics. Judge Colt also referred to Blumenbach's classification of mankind into five principal types: The Caucasian or white, Mongolian or yellow, Ethiopian or black, American or red, and Malay or brown, simplified by Cuvier into Caucasian, Mongol and negro, or white, yellow and black races, as well as to Professor Huxley's division into five types, viz.: Australoid (chocolate brown), Negroid (brown black), Mongoloid (yellow), Xanthochroic (fair whites), and Melanochroic (dark whites), the fair whites being the prevalent type of inhabitants of northern Europe, and the dark whites of southern Europe.

Judge Bledsoe, in the Southern District of California, refused naturalization to a native of Korea, a subject of Japan, who had served in the great war, and was honorably discharged (*In re En Sk Song*, 271 Fed. 23). The discussion in his opinion was limited largely to the effect of legislation subsequent to the Revised Statutes, and the interpretation of the phrase "white persons" was not discussed.

Judge Van Valkenburgh, in the Eastern District of Missouri (*In re Easurk Emser Charr*, 273 Fed. 207), in denying naturalization to a native of Korea, a subject of Japan, who had served in the United States Army and had been honorably discharged, because he held the case governed by section 2169 of the Revised Statutes, said the meaning of that section "has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. In *Ex parte Dow* (D. C.), 211 Fed. 486, and *In re Dow* (D. C.), 213 Fed. 355, it was held that the words do not mean a person white in color, nor do they designate racial distinction, meaning Caucasian or Indo-European, but are to be construed rather as a geographical term, referring to the peoples who were commonly known in the United States as those inhabiting Europe, and whose descendants at the time of the passage of the Act of 1790 formed the inhabitants of the United States, excluding Africans. * * * In accordance with numerous holdings, the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow, and brown races.

"Whether or not historically the term 'Caucasian' is accurate as a designation of the white race, it is a term which appeals to common understanding and to that of the lawmakers with practical definiteness, and the term 'white person' may now be said to have a well-understood meaning."

Notwithstanding what some of these learned judges have said as to the sufficiency and clearness of the statutory definition, Congress did not rely upon it in dealing with the Chinese, but by the act approved May 6, 1882, section 14 (22 Stat. 58), enacted "that hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

B. SCIENTIFIC AUTHORITIES.

The weight of scientific authority no more clarifies the subject than have the varying judicial decisions.

Nelson's Perpetual Loose Leaf Encyclopedia (New York, 1921), under the title *Ethnology*, states:

"Opinions still differ both as regards the number and the interrelations of the primary divisions (of mankind). But the tendency now is to accept Sir Henry Flower's four groups (negro, Mongolic, American and Caucasian) as fundamental, and to consider these, not as four distinct species, but only as four marked varieties of a single species of the genus homo."

Quatrefages' *Histoire Generale des Races Humaines* (Paris, 1889) divides the fundamental types of the human species into the white or Caucasian, the yellow, or Mongolic, and negro or Ethiopic, adding (p. 299):

"Ces noms sont mauvais. Ils reposent sur des idees fausses et ont le tort de les reveiller. Il y a des Blancs aussi noirs que n'importe quels Negres. * * * Seules, les expressions de Jaune et de Mongolique ont quelque chose de fonde."

("These names are not good. They rest on false ideas, and it is wrong to revive them. There are whites as black as any negroes. Only the expressions yellow and Mongolian have any basis.")

Brinton's classification is based largely on hair, that is, the races having black wavy hair, black woolly hair, straight dark hair or light curly hair. He maintains that the white race is geographically and historically an African race, and that the purest types of whites always have been found in greatest numbers in western Europe and northwestern Africa. (*Races and Peoples*, by Daniel G. Brinton, Philadelphia, 1901, pp. 97-100, 105-112.) He divides the Mongolian race into two great branches, the Sinitic and the Sibiric, classifying the Japanese under the latter, and says:

"There is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian-like people in appearance in eastern Asia. * * * The 'fine' type of the aristocracy, the Japanese ideal, as distinct from the 'coarse' type recognized by students of the Japanese of today, is perhaps due to the Aino."

In the dictionary prepared by the Immigration Commission, published as volume 5, Senate Document No. 662, 61st Congress, Third Session, it is stated:

"The number of the chief divisions or basic races of mankind is more in dispute at the present time than when Linnaeus proposed to classify them into four or Blumenbach into five great races. * * * In preparing this dictionary, however, the author deemed it reasonable to follow the classification employed by Blumenbach, which school geographies have made most familiar to Americans, viz., the Caucasian, Ethiopian, Mongolian, Malay

and American, or, as familiarly called, the white, black, yellow, brown and red races."

The Japanese are stated to stand much nearer than the Chinese, especially in language, to the Finns, Lapps, Magyars and Turks of Europe, who are the westernmost descendants of the Mongolian race.

Kingsley, in "Natural History of Man" (Boston, 1885), says:

"The Japanese fall into two tribes, the real Japanese and the Aino. The former is a mixed people of immigrant Mongolian races and the autochthonous population whom Japanese history calls Emishi. The latter, though not identical with the Aino, are related to them. * * * Thus we find three ethnic elements: 1. The Aino, the original inhabitants of central and northern Japan. 2. A Mongolian tribe, like the better class of Chinese and Koreans, who settled in the southwestern part of the island. 3. A Malay-like tribe, who first settled in the south, and then gradually spread over the whole island and conquered it" (p. 433).

Keans, "Man, Past and Present" (Cambridge, 1920), considers that the characteristics of the hair form the most satisfactory basis for a classification of mankind. Hence, he divides man into three main varieties of hair, called straight, wavy and woolly. Deniker, in "The Races of Man," adds a fourth, frizzy. Color he regards as of much less importance, and he points out that in Japan the unexposed parts of the body are generally white.

CONCLUSION.

The fact is, therefore, that Congress in repeating without qualification the words "white persons" has left the subject in great uncertainty. All authorities without exception agree on dismissing the idea of white as a characteristic to be demonstrated by ocular inspection. If it is sought to interpret it as an ethnological term, authorities are so conflicting that it opens the way to serious inequalities of application. To apply the ambulatory definition which some of the learned judges have adopted is to rob the law of all definiteness and to leave it to the whim of the particular judge or court. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the Act of 1870, and after that date, as having no practical significance. If this would run counter to the intention of Congress, that body can readily amend the act so as to make clear the legislative intention. But the subject certainly should not be left in the uncertain state in which it now is. So far as the petitioners in the present case are concerned, all that appears is that they were born in Japan and that they were duly naturalized by a state court in 1902. Every intendment of fact in favor of the jurisdiction therefore must be presumed. They may have been pure-blooded Ainos, and as such "Caucasian" within the meaning of that term, as employed by most of the ethnologists and in a majority of the decisions construing the term "white persons" to mean those of the Caucasian race, so that in any event the judgment of the lower court must be reversed.

Petitioners therefore respectfully urge that the judgment of the supreme court of the State of Washington be reversed and the cause remanded with directions that the writ issue.

CORWIN S. SHANK,
Attorney for Petitioners.

GEO. W. WICKERSHAM, of Counsel.

3. BRIEF FOR RESPONDENT, BY L. L. THOMPSON.

STATEMENT.

The statement contained in petitioners' brief correctly states the facts and is accepted by respondent.

ARGUMENT.

Petitioners have filed two briefs herein: (1) their original brief, and (2) a supplemental brief which consists of a copy of the brief of the late David L. Withington in the case of *United States vs. Ozawa*, to be argued with the present action. In the first brief but one material contention is made, i. e., that section 2169 of the Revised Statutes is obscure and incapable of exact construction unless the phrase "free white persons" be construed as including all persons other than negroes, and that consequently the court should give to it this broad construction, notwithstanding the fact that since negroes are otherwise expressly included the effect of such a construction will be to make the section "as having no practical significance." The brief of Mr. Withington, on the other hand, relies upon the following general propositions: (1) That section 2169 does not modify the Act of June 29, 1906; (2) that in any event the section means free white persons as distinguished from persons of the black race, and therefore includes the Japanese, and (3) that, in the alternative, the Japanese are of Caucasian rootstock and therefore free white persons within the contemplation of the statute. To this we may also add the subordinate and more or less irrelevant proposition that the Japanese are assimilable. It will thus be seen that the only point common to both briefs is the point that section 2169 means nothing since the passage of the Acts of 1870 and 1875. We are therefore somewhat in doubt as to whether counsel for petitioners intends to urge the additional points made in the *Ozawa* brief. The fact that they have seen fit to expressly urge a point common to both briefs, but have not referred to the other propositions, would seem to justify that they have abandoned them. Since, however, they do not expressly repudiate those points and have brought them to the attention of this court, we feel compelled, at the risk of undue prolixity, to consider them.

I.

SECTION 2169 LIMITS AND MODIFIES THE ACT OF JUNE 29, 1906.

Approximately one-half of the *Ozawa* brief is devoted to the proposition that the Act of June 29, 1906, contains all the statutory law applicable to the naturalization of the Japanese, and is not controlled or modified by section 2169, but that that section, if it has any application at all, only applies to a few isolated sections of the Revised Statutes of 1873 which were not expressly repealed by the Act of 1906. In effect, this is but an indirect way of contending that section 2169 has been repealed by implication, although an express statement to that effect is carefully avoided.

The Act of July 14, 1870 (16 Stat. 254), provided "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent." The federal statutes were codified in 1873 and in this codification the phrase "being a free white person" was dropped out of the first section in title 30 relating to the naturalization of aliens, and a section numbered 2169 was inserted, which read:

"The provisions of this title shall apply to aliens of African nativity and to persons of African descent."

The Act of February 18, 1875, to correct errors and supply omissions in the Revised Statutes (18 Stat. 316), amended section 2169 to read:

"The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

This is the form in which it now appears in the Revised Statutes.

The Act of June 29, 1906 (34 Stat., part I, p. 596), consists of 31 sections. Sections 1 to 14, inclusive, create a bureau of immigration and naturalization and deal with the courts and procedure by which naturalization may be effectuated. Sections 16 to 25 define certain crimes in connection therewith. Section 27 prescribes forms to be used. Section 29 makes an appropriation, and section 30 provides for the naturalization of all persons not citizens who owe permanent allegiance to the United States. Section 31 declares when the act shall take effect. Section 26 of the act expressly repeals sections 2165, 2167, 2168 and 2173 of the Revised Statutes, and section 39 of the Act of March 3, 1903 (32 Stat. 1213), but makes no mention of section 2169.

We shall consider this question (1) as an original proposition, (2) viewed from the standpoint of legislative history, (3) as construed by the executive department of the Government, and (4) as considered by the lower federal courts.

1. As an original proposition.

It will be observed that the repealing section in the Act of 1906, although it expressly repeals sections which precede section 2169 in the Revised Statutes, makes no mention of that section. It is fundamental that statutes must, if possible, be given a consistent construction, and that repeals by implication are not favored. It would seem that the application of these rules must compel the conclusion that the Act of 1906 is limited by section 2169. The Ozawa brief, beginning upon page 11, attempts to avoid the obvious application of these rules of construction by contending that section 2169 is applicable only to those sections of the Revised Code of 1873 left unrepealed by the Act of 1906. As is pointed out, however, the only sections of that act which are now of any practical force are sections 2166, 2172 and 2174, referring to the naturalization of soldiers and sailors, seamen and minor children. The effect of the contention is to impose a racial limitation upon these special classes who at the same time receive special consideration in other respects when there is no such limitation imposed upon ordinary alien applicants. Such a construction would be without reason and we think must be rejected.

The Ozawa brief emphasizes the proposition that section 2169 is an enlarging and not a restrictive clause (brief, p. 13). This is clearly incorrect, because if this were so, there would be no necessity for section 2169, since the right of negroes to be naturalized under such construction would have been deemed to have been covered by section 2165.

Even if this were true, however, the effect would not be different unless section 2169 be rejected as mere legislative surplusage, because, unless this is done, the phrase "free white persons," in the section, must be taken as explanatory of the word "alien" in section 2165, which reads:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise."

It therefore appears that, even though we consider the section as an enlarging clause, it must have been passed with some purpose in view, and that only purpose would be that without it aliens other than those of the white race would not be included, which would lead to the same result as though the section were deemed technically restrictive.

The better view, however, is that since section 2169 is subsequent to section 2165, it was passed for the purpose of restricting the word "alien" as used in the former section.

We see no merit in the point that the passage of the Chinese Exclusion

Act of 1882 indicates a contrary legislative intent (Ozawa brief, p. 14). The general Naturalization Act as amended classified applicants according to color, while the Chinese Exclusion Act made a classification based upon nationality. The fact that the first act also included the other is not material. The only deduction to be drawn from the Act of 1882 is that Congress, in so far as the Chinese were concerned, was not content to leave the question dependent upon a judicial determination of a question of fact, possibly based on ethnological grounds.

The contention is also made that the effect of the words "provisions of this title" in section 2169 is to make the section inapplicable to the Act of 1906 (Ozawa brief, p. 12). Title XXX, which is referred to, included all the laws relating to the naturalization of aliens. The Act of 1906 with some three or four exceptions, including section 2169, repealed these sections and substituted other provisions upon the same subject, but did not repeal section 2169. The word "title" was simply used in the original revision for purposes of convenience and was not used in the section as originally enacted (16 Stat. 254). As used in the revision of 1873 it referred to all existing laws with respect to naturalization, and when Congress failed to repeal the section, while at the same time it substantially repealed the remainder of the title, the only reasonable construction is to suppose that it intended the substitute act to be subject to the same limitations as was the original measure.

Pages 17 to 26, inclusive, of the Ozawa brief are devoted to a discussion of the trend of legislation with respect to immigration since 1798. It is said that because Congress has never, except in the case of the Chinese, barred immigrants for racial reasons alone, then therefore the same liberality ought to be announced with respect to naturalization, even if that process requires the repeal of a statute by judicial decree. We are unable to appreciate the logic of this argument. The tolerated presence of an alien race within our borders, encouraged throughout our early history for economic reasons, is quite a different thing than the exercise of those rights which appertain to political equality by such aliens. The requirements with respect to naturalization have always been more drastic than those governing immigration for reasons which are quite obvious. There is nothing in the immigration statutes which aids in the construction of section 2169, and we are not aware of any legal principle which can make them applicable. The question of whether the same liberality ought to obtain in both cases is, of course, legislative, and not judicial.

Beginning upon page 23 of the Ozawa brief, attention is directed to the fact that the Immigration Act of February 5, 1917, as it originally came from the House, excluded, subject to existing treaties, "Hindoos and persons who cannot become eligible, under existing law, to become citizens of the United States by naturalization," and to the further fact that this clause, in deference to the protest of the Japanese Government, was stricken from the bill as finally enacted. We can see nothing in this fact which supports the proposition for which it is advanced. The very fact that the act as originally presented seemed to refer to existing racial barriers amounts to a recognition by the framers of the act, at least, that section 2169 was then in force, notwithstanding the Act of 1906. It is also quite reasonable to conclude that the Japanese Government recognized the fact that under the existing laws the Japanese were not eligible to naturalization, and that Congress, by striking out the clause objected to, was of the same opinion. Otherwise, there would have been no occasion for the protest and no necessity for the amendment of the act. This seems to have been the opinion of the senators who participated in the debate, as is shown by the quotations set forth upon pages 25 and 26 of the Ozawa brief.

The suggestion made upon page 27 of that brief that a contrary construction in some way violate the treaties of 1895 and 1911 with Japan is too obscure for us to comprehend. Neither of these treaties refer in any way to the matter of naturalization, and in so far as we have been able to ascertain, the Japanese Government, officially at least, has never made any such contention, although the federal courts have uniformly refused to naturalize Japanese since the statute was first enacted. The favored nation clause in these treaties, even if applicable, would be immaterial, because naturalization has never been regulated by treaties made with foreign countries.

Beginning upon page 28 of the Ozawa brief, reference is also made to the Act of May 9, 1918 (40 Stat. 542), which amends the Act of June 29, 1906, in some respects. The only reference made in this act to that section is found in section 2, which provides:

"That all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitations therein defined."

Since this act was amendatory to the Act of 1906, it seems to constitute a clear legislative recognition of the fact that the latter act is limited by section 2169; otherwise, there would be no meaning to the reference. The obscurity which the Ozawa brief appears to find in the clause "except as specified in the seventh subdivision of this act and under the limitations therein defined" is not apparent to us. The Act of 1918 adds seven new subdivisions to section 4 of the Act of June 29, 1906, numbered from 7 to 13. The 7th subdivision to section 4 as thus amended provides for the naturalization of certain persons in the military service. The saving clause in the repealing section, *supra*, obviously refers to this subdivision and was inserted to meet a possible contention that the effect of the subdivision was to permit the naturalization of persons other than free white persons and negroes, who were not named specifically by reference to their nationality in the amendatory statute. The section is perhaps subject to some technical criticism with respect to its form, but the legislative intent seems to be quite apparent. The following cases reach this conclusion: *In re Para*, 269 Fed. 643; *In re En Sk Song*, 271 Fed. 23; *Petition of Easurk Emsen Charr*, 273 Fed. 207.

This seems also to have been the view of the House committee on the revision of laws of the 67th Congress, first session. This committee recommended the passage of H. R. No. 12, which was a revision of the laws of the United States, and which passed the House on May 16, 1921. Section 37 of this revision is a re-enactment of the repealing clause in the Act of 1918 except that it strikes the words "of this act" and inserts "of section 3675 of the Code of the Laws of the United States." Section 3675 is a copy of section 4 of the Act of 1906, as amended by the Act of 1918, so that it is apparent that the codifiers had no doubt but that the reference to the seventh subdivision of this act was a reference to the seventh subdivision of section 4, as amended.

Whatever, therefore, may have been the original ambiguity in the Act of 1906, Congress, by the passage of the Act of 1918, has conclusively resolved that doubt against petitioners, because, when it modified the naturalization requirements for aliens in the military service, it expressly required that its action in that regard should not be regarded a repeal or enlargement of section 2169. This is a distinct recognition not only of the fact that section 2169 was still in existence, but also of the further and determining fact that it was not

restricted to title XXX of the original act, but operated as a limitation upon the Naturalization Act of 1906.

2. *Legislative history.*

Beginning upon page 16 of the Ozawa brief reference is made to the fact that in 1905 President Roosevelt recommended to Congress the revision of our naturalization laws and that in dealing with the different subject of immigration recommended that religious and racial differences be not made the basis of exclusion. From this it is concluded that the President meant the same remarks to apply to naturalization legislation, and a secondary implied conclusion is therefore drawn that the Act of 1906 was passed with the same understanding. A reference to the legislative history of the act will show the contrary to be the fact. The Act of 1906 was originally introduced in the House of Representatives as H. R. No. 15,442. It was drawn by a sub-committee of the House committee on immigration and naturalization, and its passage was unanimously recommended by the committee (House Rep. 1789, House Reports, vol. I. Nos. 2-2656, 59th Congress, 1st Session). This report, after relating the history of the legislation of the bill, continues:

"Your committee has not sought to make any radical changes in the principles of existing law governing naturalization, except in two particulars. It is the opinion of your committee that the frauds and crimes which have been committed in regard to naturalization have resulted more from the lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such cases. The two changes which the committee has recommended in the principles controlling in naturalization matters, and which are embodied in the bill submitted herewith, are as follows:

"First. The requirement that before an alien can be naturalized he must be able to write either in his own language or in the English language, and read, speak, and understand the English language; and

"Second. That the alien must intend to reside permanently in the United States before he shall be entitled to naturalization."

The report then analyzes the bill section by section. Referring to the repealing section, which subsequently became section 26, the committee said:

"Section 28 provides for the repeal of certain sections of existing law, the provisions of which have been embodied in the bill submitted herewith, except in two cases, and in those your committee believes that the sections are no longer necessary."

The report then concludes by submitting as an appendix copies of sections "which are proposed to be repealed." These sections consist of sections 2165, 2167, 2168, 2173 and section 39 of chapter 1012, U. S. Statutes of 1903. When the bill came before the House, the House resolved itself into a committee of the whole and Representative Bonyng of the naturalization committee thus explained the bill:

"I think, perhaps, all members of the committee are fully convinced that the naturalization laws need revision and amendment. We have at the present time, with only a few slight amendments, naturalization laws as they were written by James Madison in 1795. Under the Constitution Congress is authorized to establish a uniform rule of naturalization. The naturalization laws at the present time do not prescribe a uniform system of naturalization nor establish any code of procedure in such cases. * * * The bill which we present today *does not change the fundamental law* in reference to naturalization except in two particulars, to which I will address myself a little later, but it does provide for a general and uniform system of naturalization to be enforced throughout the United States. * * *

"The bill that is presented today undertakes to correct the abuses that have grown up under our lax and careless system of naturalization, or perhaps I ought to say that have grown up because we have no system of naturalization which is uniform throughout the United States. * * *

"Perhaps I can not do better than to give a general outline of the provisions of the bill. As I said a few moments ago, it does not seek to change the fundamental principles that have governed in naturalization cases from the foundation of the Government, except in two particulars. Those two particulars, Mr. Chairman, are, first, that before an alien can become naturalized, if this bill shall be enacted into a law, it will be necessary that he shall satisfy the court that he is able to write either in his own language or in the English language, and able to read, speak, and understand the English language. That is a new qualification required of the alien for naturalization." (*Italics ours.*) (Cong. Record, vol. 40, p. 3640.)

"The other additional qualification that is required from the alien is that he shall in his petition for naturalization declare that it is his intention to reside permanently in the United States. * * * The rest of the bill, Mr. Chairman, is in effect either administrative or *provides a code of procedure*, stating the method which an alien shall adopt to become naturalized." (*Italics ours.*) (*Ibid.*, p. 3643.)

It was thereafter debated and amended in the House (40 Cong. Rec., pp. 7033, 7761, 7777 and 7869) and was passed as amended. Upon its arrival in the Senate, it was referred to the Senate committee (*Ibid.*, p. 7913) and was reported back with certain amendments (*Ibid.*, p. 9009). The House at first refused to accede to the Senate amendments (*Ibid.*, 9381-9407) whereupon a joint committee was appointed, these differences reconciled (*Ibid.*, 9505, 9576 and 9691) and the bill finally passed (*Ibid.*, 9680-9777).

It is unnecessary to quote from the various debates. It was thoroughly considered in both houses, section by section, and the debate was unusually exhaustive. It seems indisputable that the original statement of the committee that the only changes in the fundamental law were with regard to educational qualifications seems to have been accepted without question by everybody. It is unthinkable that the Western members of Congress would have permitted such a far-reaching piece of legislation to pass, at least without debate, and when to the silence of the members is added the assurance of the committee that no such change was contemplated, the conclusion is impelling that Congress intended the act to be subject to section 2169.

Further support for this conclusion is likewise found in H. R. No. 12, which is a compilation of the Laws of the United States up to March 4, 1919, which compilation was prepared by the House committee upon the revision of laws, and passed by the House of Representatives May 16, 1921. (61 Cong. Record, 67th Cong., 1st Session, 87-14-77.) This compilation groups all the existing laws relating to immigration and naturalization under a single chapter known as "title 23". Section 3689 of the compilation is a reenactment of section 2169, so that it reads as follows:

"The provisions of this chapter shall apply to aliens, being free white persons, and to aliens of African nativity, and to persons of African descent."

A reference to the Congressional Record, before cited, will show that this compilation was the result of several years of very careful work upon the part of the committee. The compilation as finally presented to Congress shows that it was the opinion of the committee that section 2169 modifies the Act of 1906, since the explanation of the bill made to Congress shows

that it did not purport to contain any new legislation, but was only intended as an orderly arrangement of the statutes existing upon March 4, 1919.

3. *Executive construction.*

The departments of the Federal Government charged with the handling of naturalization matters have uniformly given effect to section 2169 subsequent to 1906, as is evidenced by the reports of the division of naturalization, afterwards the bureau of naturalization.

In the report of the Department of Commerce and Labor for 1907, page 198, it is said:

"Some (courts) have apparently construed section 2169 of the Revised Statutes to mean that only Chinese or 'Mongolians' are excluded from naturalization, and that all other races are eligible."

Report for 1908, page 294:

"Section 2169 of the Revised Statutes forbade the naturalization of all aliens who are not 'white persons or persons of African nativity or African descent,' and is still operative."

At page 295, see tabulation showing three suits pending to cancel certificates as having been issued contrary to R. S. 2169.

Report for 1909, page 287, shows that two certificates were canceled that year for violation of R. S. 2169. At pages 300, 301 and 302, report shows twenty-one persons were denied citizenship "because they were not white persons in the sense of those words in section 2169 of the Revised Statutes." Report does not show to what races these twenty-one belonged. Four were denied admission in New York, six in North Dakota, eleven in Washington.

Report for 1910, at pages 352-353:

"Moreover, in some places the view is apparently held that if the negroes could justly be naturalized *en masse* it is both useless and inconsistent to be critical in bestowing a like status on the persons of any other races of mankind who desire it."

Pages 363-364 show that four were denied certificates under Revised Statutes 2169, while at page 368 report shows one certificate was canceled under same section.

Report for 1912, at page 381:

"The present naturalization law vindicates the wisdom of 'the fathers,' for after a most unusual study and consideration, and with the benefit of a century of actual experience, it embodies the qualifications for naturalization that they had originally considered essential."

In 1913 the separate Department of Labor was created, and the division of naturalization changed to the bureau of naturalization. Report of Department of Labor for 1913, at pages 362-363, shows four petitions were denied under Revised Statutes 2169: One in Michigan, one in Minnesota, one in Montana, one in New Jersey. At page 370:

"Besides these known reasons for refusing to accept and file a petition, there are many others which raise a doubt in the clerk's mind; but in such cases he can only express his doubt to the applicant, leaving it to the latter to assume the chance under existing conditions of making a petition which may be denied by the court. As an illustration of such case, there may be given, say, the application of a Tibetan, of a Hindu, of a Malay. To the eye of a clerk such applicant may appear to be neither a white person nor an alien of African origin, to whom alone the privilege of becoming naturalized is confined by section 2169, Revised Statutes. As he cannot anticipate the action of the court in such a case, there remains nothing for

him to do beyond explaining to the applicant the grounds of his doubt, and accepting the petition, if the applicant is insistent."

Report for 1914, at pages 541 and 542, shows three persons were denied naturalization under Revised Statutes 2169: Two in South Carolina and one in Nebraska. At page 543 report says:

"Attention is particularly drawn to the last item in the first of the two foregoing groups of denials. It is in effect a statement from the judges of the naturalization courts of the United States, state and federal, that with the exception of two cases in South Carolina and one case in Nebraska not one of the 118,572 petitioners for naturalization was other than a 'free white person or person of African nativity or an alien of African descent,' *section 2169 of the United States Revised Statutes excluding all other aliens from the privilege of becoming citizens by court process.* The statement is merely adverted to here as one of natural interest in view of the fact that our alien population is composed of elements coming from practically every race and every nationality of the habitable globe." (Italics ours.)

Report for 1915, at pages 387-388, shows eight aliens denied admission under 2169, as follows: California, one; Louisiana, one; Montana, one; Oregon, one; Rhode Island, two; South Carolina, one; and Washington, one. At page 389:

"Only 8 applicants of all the various races who applied for citizenship were denied for the reason that they were held to be neither 'white persons' nor 'persons of African nativity or African descent,' *and therefore not eligible to become citizens of this country under the limitation provided in section 2169 of the United States Revised Statutes.* The figures given suggest the very comprehensive meaning, in the view of the courts, of the words above quoted from the statute." (Italics ours.)

Report for 1916, pages 432-33-34, shows three denials under Revised Statutes, 2169, as follows: Hawaii, one; Pennsylvania, one; Washington, one.

Report for 1917, pages 479-80, shows fifteen denials under section 2169, as follows: California, three; Hawaii, one; Illinois, two; Montana, three; North Dakota, one; Oregon, one; Pennsylvania, two; Wisconsin, one; Wyoming, one.

Report for 1918, at pages 586-87, denials under section 2169 total twenty-six, segregated as follows: California, four; Colorado, ten; Indiana, one; Montana, one; New Jersey, nine; Wyoming, one.

Report for 1919, at pages 756-57, denials under section 2169 total twenty-one as follows: Arkansas, two; Idaho, one; Indiana, four; Iowa, one; Montana, one; New York, four; Oregon, three; Washington, four; Wyoming, one.

Report for 1920, pages 771-72, denials under section 2169 total thirteen, as follows: California, one; Idaho, one; Illinois, one; Indiana, seven; Massachusetts, two; North Dakota, one.

We have found but one officially reported opinion of the Attorney-General of the United States which touches upon this question since 1906, but this opinion, curiously enough, was given by former Attorney-General Wickersham to the Secretary of Commerce and Labor under date of July 30, 1909 (27 Ops. Atty. Gen., p. 507). In that opinion Mr. Wickersham had occasion to consider the effect of section 1994 of the Revised Statutes as applied to a woman who had married a citizen of the United States in 1909. Section 1994 provides:

"Any woman who is now or may hereafter be married to a citizen of

the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." (Italics ours.)

Attorney-General Wickersham concluded that the only limitation imposed upon the right to be naturalized under this section was a racial limitation. In other words, the woman must be a free white person within the contemplation of section 2169. This is apparent from the fact that after discussing various authorities, he said:

"The authorities above cited seem to settle the proposition that the words 'who might herself be lawfully naturalized,' in the Act of February 10, 1855, and section 1994 of the Revised Statutes, refer to the class or race who might be lawfully naturalized, and that compliance with other conditions of the naturalization laws is not required." (Italics ours.)

While this opinion does not expressly refer to the Act of 1906, it seems obvious that if the effect of that act was to abrogate racial disqualifications with respect to naturalization as is contended in the Ozawa brief, then the repeated references which are made in the opinion to section 2169 and to racial classes were entirely unnecessary. This opinion may perhaps furnish an explanation of the failure of the main brief of petitioners to expressly adopt the views stated in the Ozawa brief upon this subject.

4. Judicial authorities.

We are unable to understand the basis of the statement made upon page 31 of the Ozawa brief that "the point that section 2169 does not restrict the Uniform Act of June 29, 1906, but is confined by its terms to title XXX, has never been adjudicated at all," because a number of federal courts have expressly passed upon the question adversely to petitioners, either directly or by way of dictum.

In *Bessho vs. U. S.*, 178 Fed. 245, the court considered specifically only the effect of the Revised Statutes 2169 upon the Act of July 26, 1894 (28 Stat. 124), relating to persons who had served in the Navy and held that the Act of 1894 was limited by 2169. The court, however, based its conclusion upon the fact that the Act of 1906 did not repeal Revised Statutes 2169.

"By this legislation a new and complete system of naturalization was adopted, all the details of which, together with the method of procedure and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed. In section 26 of that act is found an express repeal of sections 2165, 2167, 2168 and 2173 of the Revised Statutes * * *. These repealed sections are all included in title 30 of said Revised Statutes and demonstrate beyond doubt that the Congress carefully considered all of the provisions of that title and that it intended that the unrepealed sections thereof should still remain in force. Among those unrepealed is section 2169, which we thus find to be virtually reenacted, and declared to be one of the rules under which future naturalizations are to be conducted. * * *" (*In re Alverto*, 198 Fed. 688; *In re Rallos*, 241 Fed. 686.)

Held that the Act of 1906 did not expressly or by implication repeal Revised Statutes 2169.

In re Mallari, 239 Fed. 416, while differing from the cases last above cited with respect to the effect of section 30, Act of 1906, the court held that Revised Statutes 2169 was not repealed by the Act of 1906.

"The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization. It repealed various sections of the Revised Statutes; but it did not repeal section 2169, which originally formed a part of the Naturalization Act of 1870, as amended in 1875,

* * *. Until the passage of section 30, *supra*, only persons described in section 2169 could be naturalized." (*In re Bautista*, 245 Fed. 765.)

"While we are of opinion that section 2169 of the Revised Statutes was not repealed by the Act of June 29, 1906, we think we have clearly shown by the proceedings in Congress that it was expressly amended by that act so as to admit to citizenship all persons not citizens who, owing 'permanent allegiance to the United States' and possessing the other qualifications provided by the statute, became residents of any state or organized territory of the United States. * * * It must, therefore, have been the purpose of Congress to so modify section 2169, R. S., as to admit to citizenship the Filipino * * *". (*U. S. vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.)

The language of this decision upon the construction of the statutes was dictum as it was not necessary to the conclusion reached, but is perhaps the best statement upon the subject.

"Counsel for certain Syrian interveners as *amici curiae* contend that the words 'free white persons' were used simply to exclude slaves and free negroes. If so, of course all other aliens were included. This is enforced by the further argument that the Act of June 29, 1906, * * * repealed section 2169, Rev. St. U. S., by necessary implication, and that all aliens except those expressly excluded, like the Chinese, are now eligible to citizenship. The Act of 1906 does provide for a uniform rule for the naturalization of aliens throughout the United States. Section 4, regulating proceedings, like section 2165, Rev. Stat. U. S., provides 'that an alien may be admitted to become a citizen of the United States in the following manner and not otherwise.' But section 2169, *supra*, limited the application of the whole title to persons being free white persons or of African race, and section 26, the repealing clause of the Act of 1906, makes no mention of section 2169. Of course, if the latter is inconsistent with or repugnant to the act, it is repealed, though not mentioned. *But we do not think it is. Indeed, the form annexed for declarations of intention requires the applicant to state his color, as well as his complexion. It seems to us incredible that Congress could have intended to make such a departure from existing law by implication merely.*" (Italics ours.)

In the case of *In re Geronimo Para*, 269 Fed. 643, the court had before it the question of whether a Japanese who had served in the military forces of the United States and therefore came within the seventh subdivision of section 4 of the Act of 1906, as amended by the Act of May 9, 1918, was entitled to be naturalized. The court answered the question in the negative, saying:

"The question is whether the words 'any alien,' appearing in the amended Act of May 9, 1918, are broader than the words 'any alien' used in section 2166 of the Revised Statutes which I have above quoted. This last statute was passed upon by the circuit court of appeals of the Fourth Circuit and by Judge Chatfield and Judge Hanford in the decisions I have cited, and the words 'any alien' were held to be limited, by section 2169 of the Revised Statutes, to white persons and aliens of African nativity and to persons of African descent. It might well be held under the reasoning of these cases that section 2169 still limited the provisions of the Act of May 9, 1918, except so far as that act by expressly covering native-born Filipinos and Porto Ricans enlarged the former provisions *pro tanto*, even if section 2169 had not been referred to; but it seems clear that the words of section 2 of the Act of May 9, 1918, expressly providing that 'nothing in this act shall repeal or in any way enlarge section

twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined,' were intended to preserve the definition of the classes of persons who could become citizens of the United States except certain Porto Ricans and Filipinos.

"The Naturalization Act of June 29, 1906, repealed sections 2165, 2167, 2168, and 2173 of the Revised Statutes, while it retained section 2169, defining the classes of aliens which may be naturalized. This section is expressly preserved and practically re-enacted by section 2 of the Act of 1918. If the words 'any alien' are to be taken literally, not only would a meaning be given wholly contrary to existing judicial interpretation, but all the definitions of section 2169 would be rendered meaningless, and even Chinese who had served in the Army could be naturalized, in spite of the express language to the contrary."

A similar conclusion was reached in the case of *In re En Sk Song*, 271 Fed. 23, in which case a native of Korea who was a subject of Japan and an honorably discharged soldier in the American Army was refused naturalization under the provisions of subdivision 7 of section 4 of the Act of 1906, as amended, purely upon racial grounds. Considering the contention that section 2169 did not modify section 4 of the Act of 1906, as amended, the court said:

"By the Act of Congress of June 29, 1906 (34 Stat. 596), a pronounced departure in the matter of the procedure to be followed in naturalizing aliens was ordained. The action then taken was intended to provide 'for a uniform rule for the naturalization of aliens throughout the United States.' (*U. S. vs. Morena*, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359.) It was concerned with matters of procedure almost entirely. The requirements of the Revised Statutes providing for at least five years' residence in the United States, and for the making of the declaration of intention at least two years prior to the application for final citizenship papers (sec. 2165, R. S.) were substantially reincorporated into the new provisions. Section 2169, R. S. (Comp. St., sec. 4358), originally limiting the privileges of naturalization to 'free white persons,' and later to persons of African nativity or descent in addition (see *In re Singh* [D. C.], 257 Fed. 209, 210), was left intact.

"* * * Repeals by implication are not favored, and I am persuaded that, if nothing more were contained in the law than the subdivision 7 of the Act of May 9, 1918, the privilege of naturalization would still have to be limited by the terms of section 2169. But Congress made assurance doubly sure, so to speak, by the provision above noted, contained in section 2 of the Act of May 9, and thereby expressly recognized and insisted upon, as a national declaration of policy, the continued and controlling efficacy of section 2169, except in the instance referred to, and that instance, I am persuaded, is the privilege then for the first time accorded to native-born Filipinos."

A similar conclusion was reached with respect to a Korean who had served in the United States Army in the case of *Petition of Easurk Emsen Charr*, 273 Fed. 207. The court said, in part:

"The amendments made were not to the title as a whole, but primarily to section 4 of the Act of June 29, 1906, 34 Stat. 596. This section deals, not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. This in itself is significant in its bearing upon the specific interpretation we are required to make.

"* * * Incidentally it has been urged that section 2169 was repealed, by implication, by the Act of June 29, 1906 (34 Stat. 596). The contention has uniformly been rejected, and, notably, in cases involving Filipinos. (*In re Alverto* [D. C.], 198 Fed. 688; *In re Rallos* [D. C.], 241 Fed. 686; *In re Lampitoe* [D. C.], 232 Fed. 382; *United States vs. Balsara*, 180 Fed. 694, 103 C. C. A. 660.)

"* * * The repealing section of the Act of 1906 did not include section 2169, and the present Act of 1918 expressly preserves it in force, except as specified in the seventh subdivision of this act and under the limitation therein defined."

In addition to these authorities which expressly consider the question, attention is directed to the fact that the lower federal courts have in many cases subsequent to 1906 construed and applied section 2169 without expressly considering the effect of the Act of 1906. These cases, however, must be taken as authority of some weight, at least; otherwise there would have been no occasion for discussion with respect to section 2169.

II.

SECTION 2169 IS NOT A NULLITY.

Petitioners make substantially this argument, and it is virtually the only argument advanced in the main brief. It is said that in 1790, when the phrase "free white persons" was first used in the Act of March 26, 1790 (1 Stat. 103), the privilege of naturalization was intended thereby to be offered to all free white persons who were not black, and that consequently when the Act of July 14, 1870 (16 Stat. 254), extended the privilege to "aliens of African nativity and to persons of African descent," section 2169 "had no practical significance." This is but a diplomatic way of stating that Congress, when it inserted the phrase "free white persons" in the section by the Act of February 18, 1875 (18 Stat. 316), was indulging in a legislative action of a meaningless character. The extraordinary nature of this contention must at once be apparent to the court when it is remembered that it is a primary rule of statutory construction that courts are bound, if possible, to give to a statute a construction which will give it some force and effect rather than to import to the legislature the intention of enacting a meaningless measure.

As was said in the case of *Market Co. vs. Hoffman*, 101 U. S. 112 (115):

"It is a cardinal rule of statutory construction that *significance* and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgement, section 2, it was said 'that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or *insignificant*.'" (Italics ours.)

This quotation seems peculiarly pertinent in view of the position taken in petitioners' brief that section 2169 is now of no practical significance. See, also, *Unity vs. Burrage*, 103 U. S. 447, 457; Black on Interpretation of Law, 2d Ed., p. 154, 21 R. C. L. 1004.

We shall consider the question in the same manner in which the preceding proposition was discussed.

(1) Legislative history of section 2169.

It is probably true that at the time of the passage of the Act of March 26, 1790, Congress did not have in mind the question of the naturalization of Asiatic aliens, although it is also probable that the possibility of naturalization of Indians was considered, because as early as 1827, Chancellor Kent in volume 2, page 72, of his Commentaries, in discussing this clause of the statute, says:

"The act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume this excludes the inhabitants of Africa, and their descendants; and it may become a question to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, *or the yellow or tawny races of the Asiatics*, and it may well be doubted whether any of them are 'white persons' within the purview of the law." (*Italics ours.*)

The early congressional debates throw little light upon the subject, and the phrase seems to have been carried through subsequent Naturalization Acts prior to 1870 without debate. (Act of January 29, 1795, 1 Stat. 414; Act of April 14, 1802, 2 Stat. 153; Act of March 22, 1816, 3 Stat. 258; Act of May 26, 1824, 4 Stat. 69.)

The Civil War resulted in the emancipation of the negroes and the consequent passage of the Act of July 14, 1870 (16 Stat. 254), which act extended the right of naturalization to persons of African nativity and descent. This act, however, did not repeal the limitations theretofore made by prior acts which required aliens to be free white persons. When this measure was pending before Congress, Senator Charles Sumner offered an amendment to strike the word "white" from the statute as it then existed so that all racial barriers would be eliminated, but the amendment was rejected through the efforts of certain Western senators who objected upon the ground that the striking out of the word would authorize the naturalization of Asiatics. (Congressional Globe, 1869-70, part 6, 5114-5125, 5148-5167, 5168-5177.)

We quote the following excerpts from the debate which showed the current senatorial view at that time:

Mr. Tipton. "I wish to say that before this question is ever settled in this country Senators will have to meet the issue whether Christian civilization can be sacrificed or brought in dangerous competition with any system of paganism." (*Ibid.*, p. 5124.)

Senator Stewart of Nevada and Senator Williams of Oregon strenuously opposed the amendment of Senator Sumner as it would authorize naturalization of Chinese.

Mr. Stewart. "* * * The proposition of the Senator from Massachusetts (Mr. Sumner) is nothing more nor less than this: to extend naturalization to Chinese coolies. * * * They are pagans in religion, monarchists in theory and practice, and believe in their form of government, and no other, and look with utter contempt upon all modern forms as dangerous innovations; who believe in their monarchical form of government as they believe in their religion; who will sacrifice life for it; who will commit suicide for their devotion to their government and their religion. * * *." (*Ibid.*, p. 5150.)

Mr. Stewart. "* * * The negro was among us. * * * He was born here. He had a right to protection here. He had a right to ballot here. He was an American and a Christian, * * *. But how is it with these Asiatics? They have another civilization at war with ours; a language which we shall never understand—a language which is more arbitrary and difficult than any other spoken language." (*Ibid.*, p. 5152.)

Mr. Sherman. "Mr. President, the amendment offered by the Senator from Oregon raises the question whether we shall ingraft Chinese in the nat-

uralized population of the United States. The amendment offered by the Senator from Massachusetts raises the question *whether we shall adopt by our naturalization laws the whole pagan races of the world and ingraft them in our population * * **" (Italics ours.) (*Ibid.*, p. 5152.)

Mr. Williams. "* * * Now, sir, I ask every candid man in this body, does the Declaration of Independence mean that Chinese coolies, that the Bushmen of South Africa, that the Hottentots, the Digger Indians, heathen, pagan and cannibal, shall have equal political rights under this Government with citizens of the United States?"

"* * * Elements that will not coalesce with the other elements of our population and form together a national entity are dangerous to the peace and integrity of this nation. Mongolians, no matter how long they may stay in the United States, will never lose their identity as a peculiar and separate people. They never will amalgamate with persons of European descent; * * *."

"It is only necessary to refer to our own history to illustrate the truth of the remark. Look at the inevitable and disastrous results that have followed from the contact of the white race and the Indians upon this continent. No amalgamation has occurred or is possible; * * *." (*Ibid.*, p. 5155-5156.)

Mr. Thayer. "Will he permit the naturalization laws to be applied to the Indians, will he permit Indians to avail themselves of the naturalization laws?" (*Ibid.*, p. 5161.)

On pages 5164 and 5165 there is an interesting argument between Senators Trumbull, Tipton, Thurman and Saulsbury, on the question of whether a naturalization law which excludes persons because of color is a uniform law, Senator Trumbull holding such a law unconstitutional.

Mr. Trumbull. "I do hope that now the Senate will not act so inconsistently as to vote down this amendment. (Mr. Sumner's.) * * * We have now by a distinct vote placed upon this bill a provision that any person of the African race or of African descent may be naturalized. We have struck the word 'white' out of the naturalization so far as it applies to the Hottentot, to the pagan from Africa. Now, it is proposed to deny the right to the Chinaman, * * *." (*Ibid.*, p. 5177.)

It will thus be seen that the unanimous legislative view of the times seems to have been that the phrase "white persons," as it then stood in the naturalization laws, operated to bar Asiatic races in general; otherwise there would have been no reason for Senator Sumner to have offered the amendment and no logical argument for the opponents thereto.

We appreciate the fact that perhaps it may be suggested that these statements should not be considered by the court under the rule announced in *Duplex Printing Press Co. vs. Deering*, 254 U. S. 443, and cases cited. We have inserted them (1) for the reason that this is done upon pages 25 and 26 of the Ozawa brief with respect to another statute, and (2) because of the fact that such an amendment was offered and rejected with practically the unanimous view of all persons participating in the debate, that it would change the then existing statute, is proper to be considered in the same way that reports of congressional committees or explanatory statements of committee members are resorted to. (*Duplex Printing Press Co. vs. Deering*, *supra*.) That is to say, while the individual view of an individual legislator may not be material, the unanimous view of all participants in the debate upon an amendment which is rejected ought to be given as much weight as is the explanatory statement of the member of a committee.

In 1873 the Statutes of the United States were revised, and through an

error the phrase "free white persons" was omitted from the first section of title XXX, dealing with naturalization. Accordingly, in 1875, the Act of February 18, 1875 (18 Stat. 316), which was an act to correct errors and supply omissions in the Revised Statutes, contained a section which amended section 2169 so that it read as follows:

"The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

The Congressional Record showed that this bill was originally presented to the House by Representative Poland in behalf of the committee on the revision of the laws of the United States. (3 Cong. Record, part 2, p. 1080.) Mr. Poland, in behalf of the committee, thus explained the purpose of the bill:

"The original naturalization laws only extended to free 'white' persons. That was the condition of the naturalization laws for a great many years. A very few years since, upon some bill, Mr. Sumner of Massachusetts, then in the Senate, moved to strike out the word 'white' from the naturalization laws, and it was objected to upon the ground that that would authorize the naturalization of this class of Asiatic immigrants that are so plentiful on the Pacific Coast. After considerable debate, instead of striking out the word 'white,' it was provided that the naturalization laws should extend to Africans and persons of African descent. Precisely what the view of the gentleman was who revised the naturalization laws, I am unable to determine. He has left out the word 'white,' but has kept in the provision in relation to Africans and persons of African descent. The leaving out of the word 'white' would seem to leave the naturalization to extend to every species of alien, but that evidently was not the idea of the gentleman who revised that chapter, because he kept in the provision in relation to Africans and persons of African descent. We have proposed by this amendment to restore the law to just the condition in which it was before the revision was made." (3 Congressional Record, p. 1081.)

Mr. Willard of Vermont then moved that the law be permitted to stand as printed in the Revised Statutes, saying:

"I understand that the committee on the revision of the laws do not make this recommendation upon the merits of the question at all, but simply upon the general principle upon which they are proceeding, to restore this revision as nearly as possible to the condition in which the law was at the time the revision was passed. It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word 'white' stricken out, is not a wise statute. I understand that members from California, and the Pacific Coast, make objection to the naturalization of Asiatics, more especially the Chinese. * * *

This amendment was opposed by Mr. Page of California, who replied:

"I hope the amendment of the gentleman from Vermont (Mr. Willard) will not prevail. * * * All we ask is that the law be restored as it was prior to the change made by the committee. * * *

"I hope the change as reported from the committee on the revision of the laws will be sustained. When this question was discussed in the Senate some three or four years ago, upon a motion of Mr. Sumner to strike out the word 'white' from the naturalization laws, the Pacific Coast Senators at that time prevailed upon him to consent to amend the naturalization laws so as to include persons of African descent, which would exclude Asiatics."

The Speaker thereupon ruled that the amendment was out of order, to which ruling Representative Cox of New York, apparently a member of the committee on foreign affairs, took exception in the following language:

"I naturally asked the question therefore whether there had not been some little carelessness in the revision of the laws by which the *whole of the Asiatic Malayan race* were allowed to come in here and be naturalized. That excited a good deal of attention in the country and especially on the Pacific Coast, and now when gentlemen have a chance to save our committee further trouble, when they can legislate on the word red or yellow, they escape the dilemma on a point of order, * * *." (*Italics ours.*) (*Ibid.*, 1082.)

From this resume it will be seen that the committee was of the opinion that the effect of the bill was to exclude Asiatics from the privileges of citizenship, an opinion which was apparently acquiesced in by all persons who participated in the debate. The statement made by Representative Poland in behalf of the committee who prepared the bill is clearly relevant. (*Duplex Printing Press Co. vs. Deering, supra.*) While the statements of the other members are perhaps not strictly proper to be considered with respect to the meaning of the statute, the fact that the amendment was unsuccessfully sought to be stricken under a unanimous legislative view as to its effect, must be taken as constituting an implied acquiescence by Congress in the statement made by Mr. Poland for the committee.

(2) *Executive construction.*

Little need be said with respect to executive construction. The adjudicated cases to which we shall hereinafter refer show that the various federal executive departments who have been charged with the performance of duties under our naturalization statutes have since 1875 uniformly contended for a strict construction of section 2169 and they have not only opposed the naturalization of the Japanese (*In re Saito*, 62 Fed. 126), but have also unsuccessfully opposed the naturalization of Hindoos (*In re Mohan Singh*, 257 Fed. 209), of Armenians (*In re Halladjian*, 174 Fed. 834) and Syrians (*Dow vs. U. S.*, 226 Fed. 145), and other nationalities who may perhaps be on the border-line under a strict construction of the clause.

The officially reported reports of the Attorney-General of the United States support the same conclusion. In an opinion given under date of June 15, 1894, to the Secretary of the Treasury, Attorney-General Olney, in concluding that the Chinese were not entitled to be naturalized, said (21 Ops. Atty. Gen., p. 37):

"* * * It is sufficient for the present purpose to say that under section 2169, Revised Statutes, the privilege of naturalization is limited 'to aliens being free white persons and to aliens of African nativity and to persons of African descent'."

Similarly, in 1897, Attorney-General McKenna, referring to section 2169, said (21 Ops. Atty. Gen., p. 582):

"It has been held that a native of China is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875 (*In re Ah Yup*, 5 Saw. 155, 21 Ops. 37) * * *."

(3) *Judicial construction.*

Equal brevity with respect to judicial decisions in which section 2169 has been construed since 1875 may be observed. In some thirty cases, to which we shall hereinafter refer in another connection, all the courts, both state and federal, have construed section 2169 as prohibiting the naturalization of certain races upon racial grounds alone. They have differed as to the exact meaning of the phrase, and they have not agreed as to the status of particular races, but we have not found an adjudicated case, the decision in which has been officially reported, which dismissed the section as "having no practical significance," as does counsel for petitioners. The only case cited by petitioners in support of this construction is the decision of Judge

Lowell in the case of *In re Halladjian*, 174 Fed. 834. We do not so read that decision. While the case contains an elaborate discussion of the meaning of the phrase "free white persons" in early days and concludes that probably it then did not include Asiatics, it concedes that historically and practically the clause has come to mean something different since that time, and Judge Lowell finally admitted petitioner, an Armenian, after expressly finding that Armenians were of Caucasian origin.

It may safely be said, therefore, that the executive department of the Government and practically all of the courts, both state and federal, have for a period of approximately fifty years refused to follow the construction of the section which petitioners suggest. The court will also note that notwithstanding this uniform action by the judicial and executive departments of the Government, Congress has not only failed to amend the statute, but, upon the contrary, in the Act of May 9, 1918 (40 Stat. 542), it has recognized the continued existence of the section in the repealing clause to that act found upon page 554 which provides that "nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined." It is a familiar rule that in cases of ambiguity, executive construction, when long continued, will be deemed almost conclusive upon the courts. (*National Lead Co. vs. U. S.*, 252 U. S. 140; *Jacobs vs. Prichard*, 223 U. S. 200; *Swigart vs. Baker*, 229 U. S. 187.)

When to this is added the fact that such construction has been uniformly followed by all lower courts without contrary legislative action, it would seem that this court is almost bound to presume legislative acquiescence in such executive and judicial construction.

However, even if we consider this question as an original proposition, the same result must ensue. The Act of 1870 expressly admitted aliens of African nativity or descent, and thereby, if petitioners' construction be adopted, made of no significance the phrase "free white persons," as used in section 1 of the Act of April 14, 1802 (2 Stat. 153), which was the existing naturalization statute in 1870. Under such construction, therefore, the so-called error in the revision of 1873 by which the phrase was dropped from section 2165 of those Revised Statutes, was, in fact, no error and the amendment of 1875 a useless performance. The fallacy of this argument is conclusively demonstrated by the legislative history of the section to which we have referred.

Indeed, no serious argument is advanced by petitioners in support of this construction other than one of expediency. It is said that the phrase is difficult to interpret, that the courts are not in accord as to its meaning which has resulted in inequality in application, and from these alleged facts the court is asked to judicially repeal the section in order that Congress may, by appropriate legislation, and perchance at the risk of international complications, make its meaning more specific. The statement that the section has led to inequalities is not borne out by the decisions. The courts have had some academic differences with respect to the ethnology of certain races, like the Hindus and Syrians, but it will be found that they have quite generally resolved all doubts in favor of the alien. It may be safely said we think, that no race has been rejected that ought properly to be admitted, and that upon the contrary, we have possibly been too liberal in this respect. The fact that current judicial construction may academically be subject to scientific criticism constitutes no serious objection to the continued application of the construction. We have operated quite successfully for fifty years under a uniform construction of the section which imports to

it some meaning, and it has served to protect considerable sections upon the Pacific slope from the possible domination of Asiatic races. No serious reason is advanced by petitioners why that course should now be abandoned other than to allay the criticism of scholars, a reason entirely insufficient to justify this court in now convincing Congress of enacting meaningless legislation.

The suggestion is made that if this construction be adopted by the court Congress may further amend the statute if it is not satisfied with that construction. Since this suggestion is one of expediency, it may be answered in kind. If the classification which now obtains is not sufficiently definite, then there is no practical classification which can be used other than to specifically designate certain nationalities by name. We think that we need not dwell upon the dangerous possibilities from an international standpoint of any attempt by Congress to expressly designate certain nationalities by name in a statute of this character. There is quite a considerable difference between the mere construction and application of a statute passed fifty years ago and the enactment of a new statute which might be taken by members of other races as proclaiming to the world their alleged inferiority and unfitness to participate in the benefits of American citizenship.

III.

THE JAPANESE ARE NOT FREE WHITE PERSONS WITHIN THE CONTEMPLATION OF SECTION 2169.

Assuming that the court should refuse to hold section 2169 to be "of no significance," there still remains the general question of whether petitioners, who are natives of Japan, are free white persons within the contemplation of the section. This inquiry involves (1) the proper construction of the section, and (2) the status of the Japanese when the statute is construed.

(1) *The proper construction of the statute.*

The first court which had occasion to consider the section was Circuit Judge Sawyer in the case of *In re Ah Yup*, 1 Fed. Cas. No. 104, decided in 1878, in which it was held that members of the Chinese race were not free white persons within the contemplation of section 2169. Judge Sawyer held in that case that the words "white person" intended to include "a person of the Caucasian race," and he found that it was not used "in a sense so comprehensive as to include a person of the Mongolian race." Accordingly, he denied the petition of a Chinaman to be naturalized. In 1880 Circuit Judge Deady of Oregon, in the case of *In re Camille*, 6 Fed. 256, decided that a Canadian Indian could not be naturalized for the reason that the phrase "free white person" included only members of the Caucasian race. In 1894 Circuit Judge Colt of the district court of Massachusetts, in the case of *In re Saito*, 62 Fed. 126, construed the section as "intended to exclude from the privilege of citizenship all alien races except the Caucasian." He accordingly concluded that since a native of Japan was not a Caucasian he was not entitled to be naturalized.

The same construction was adopted by District Judge Morrow in 1895 in the case of *In re Gee Hop*, 71 Fed. 274, in which the petition of a Chinaman was denied. In 1889 the supreme court of Utah, in the case of *In re Nian*, 21 Pac. 993, held an Hawaiian ineligible, stating that section 2169 "authorizes the naturalization of aliens of the Caucasian or white races and of the African races only, and all other races, among which are the Hawaiians, are excluded." In 1897 District Judge Maxey of the Texas court admitted a Mexican to citizenship in a somewhat elaborate opinion which

appears to be based largely upon questions of policy and certain treaty provisions of the then existing treaties between Mexico and the United States. (*In re Rodriguez*, 81 Fed. 337.) He did not deny the general correctness of the test applied by Judge Sawyer, in the *Ah Yup* case, but simply held that in so far as Mexicans were concerned the letter of the statute need not be applied for reasons not here material. In 1902 the supreme court of Washington, in the case of *In re Yamashita*, 30 Wash. 234, 70 Pac. 482, refused to grant a license to practice law to a Japanese under a statute which restricted the right to practice law to American citizens, although the Japanese in question had sought to be naturalized by a court of original jurisdiction. In discussing the meaning of the section that court said (p. 237):

"When the naturalization law was enacted the word 'white' applied to race, commonly referred to the Caucasian race."

The same conclusion was reached by District Judge Hanford in 1908 in the case of *In re Kumagai*, 163 Fed. 922, where a Japanese, in all other respects properly qualified, was held to be not entitled to be naturalized. In 1909 District Judge Chatfield, in *In re Knight*, 171 Fed. 299, held that under the section "persons of the Mongolian race, either Chinese or Japanese, cannot be naturalized." In the same year Circuit Judge Lacombe, in the case of *In re Balsara*, 171 Fed. 294, accepted the Caucasian theory and admitted a Parsee to citizenship, although he suggested that possibly a stricter limitation ought to obtain. In the same year the case of *In re Halladjian*, 174 Fed. 834, was decided by Circuit Judge Lowell, a case which is quoted from quite extensively by petitioners. That case involved the right of certain Armenians to be naturalized. The opinion is voluminous and seems to indicate some doubt in the mind of the court as to the proper test to be applied, although the court offers no substitute for the racial test. In any event, the court found Armenians to be Caucasians, saying: "Armenians have always been ruled as Caucasians and white persons," so that the decision cannot be cited as repudiating the Caucasian test, although it criticizes it.

In 1909 District Judge Newman in *In re Najour*, 174 Fed. 735, admitted a Syrian upon the express grounds that Syrians were members of the Caucasian race. Similarly in 1910 the circuit court of appeals of the Fourth Circuit, in the case of *Bessho vs. U. S.*, 178 Fed. 245, held a Japanese not to be eligible, holding that Mongolians were excluded. Judge Lowell, in *In re Mudarri*, 176 Fed. 465, decided in 1910, admitted a Syrian to citizenship upon the ground that he was a Caucasian, although again expressing his dissatisfaction at the uncertainty in the statute.

Similarly, in 1910, District Judge Wolverton, in *In re Ellis*, 179 Fed. 1002, upon the admission of the Government that Syrians were members of the Caucasian race, admitted a Syrian to citizenship, refusing to adopt the contention of the Government that section 2169 should be restricted to those persons who belonged to the European races. In *United States vs. Balsara*, 180 Fed. 694, decided by the circuit court of appeals of the Second Circuit in 1910 affirming 171 Fed. 294, the court adopted the same test, and having found the Parsees to be Caucasians, admitted one to citizenship. It was said in the decision:

"We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there is any pure white race and what peoples belong to it may involve nice discriminations, but for

practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race."

In 1912 Judge Thompson in the case of *In re Alverto*, 198 Fed. 688, accepted the racial test and denied naturalization to a Filipino. In *In re Young*, 195 Fed. 645, Judge Hanford, following the same authorities, refused to naturalize a German whose mother was a Japanese. This case was afterwards retried by District Judge Cushman in the case of *In re Young*, 198 Fed. 715, where the same conclusion was adopted. In 1913 District Judge Rudkin, in the case of *In re Mozumdar*, 207 Fed. 115, admitted a high-caste Hindu, finding him to be of the Caucasian race, at the same time stating:

"But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

These authorities constitute substantially all of the reported decisions, at least of the federal court, between 1875 and 1913, a period of some thirty-eight years. Up to this time all of the courts had adopted and applied the so-called Caucasian test, although Judge Lowell criticized it from a practical standpoint. The influx of immigrants from western Asia, however, seems to have induced the Government to contend for a stricter construction, as appears from the opinions in the cases of *In re Najour*, *In re Mudarri* and *In re Halladjian*, where it was considered by the Government that the privilege should be further restricted to those persons who were not only of Caucasian but also of European origin. This effort of the Government seems to have been unsuccessful until the case of *Ex parte Shahid*, 205 Fed. 812, and *In re Dow*, 211 Fed. 486, 213 Fed. 355, decided by Judge Smith in 1913 and 1914. In the Shahid case the court dismissed the petitioner, a Syrian, for naturalization, upon personal grounds, but by way of dictum took occasion to hold that section 2169 included such persons only as were understood in 1790 to be of "European habitancy and descent." This dictum was thereafter made the grounds of decision in the Dow case, where the petition of a Syrian, in all other respects properly qualified, was denied solely upon racial grounds. The Dow case, however, was subsequently reversed by the court of appeals of the Fourth Circuit in *United States vs. Dow*, 226 Fed. 145, in which case the court refused to adopt the test followed by Judge Smith and applied the so-called Caucasian test.

In 1917 District Judge Dickinson, in the case of *In re Sadar Bhagwab Singh*, 246 Fed. 496, refused to naturalize a Hindoo, although he found him to be a member of the Caucasian race. In this case he adopted what he designated as the historical interpretation of the phrase. The reasoning of the decision is somewhat obscure, but in substance he refutes both the Caucasian test and inquiries made by ethnologists, and construes the phrase "subject to changing conditions" as having the meaning adopted by people generally. This decision does not seem to have been followed by any other court. In 1919 District Judge Bledsoe in *In re Mohan Singh*, 257 Fed. 209, admitted a Hindoo to citizenship. Discussing section 2169, he said:

"With the march of time and growth of knowledge, ethnologically and otherwise, however, it may be inferred, I think, that Congress, in its successive re-enactments of the language, has re-enacted it with its enlarged meaning in mind; and the conclusion of the circuit court of appeals of the Second Circuit, * * * to the effect that 'Congress intended by the words, "free white persons", to confer the privilege of naturalization upon members of the white or Caucasian race only' seems reasonable and just.

"Modern ethnologists use the term 'white' and Caucasian synonymously and interchangeably."

The same conclusion was adopted with respect to Hindoos by District Judge Wolverton in the case of *In re Thind*, 268 Fed. 683, decided in 1920. District Judge Hand, in the case of *In re Narasaki*, 269 Fed. 643, decided in 1919, held a Japanese not to be entitled to be naturalized. In the case of *In re Song*, 271 Fed. 23, decided in 1921, it was held that a Korean was not a white person within the contemplation of the act. In *In re Charr*, 273 Fed. 207, decided by District Judge Van Valkenburgh in 1921, a similar conclusion was reached with respect to Koreans. In construing the statute, it was said:

"The meaning of section 2169 has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. * * * In accordance with numerous holdings the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered fair white or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow and brown races."

In *Porterfield vs. Webb*, 279 Fed. 114, decided December 19, 1921, District Judge Dooling, in an opinion which was concurred in by Circuit Judge Hunt and District Judge Bledsoe, said:

"This limitation excludes three of the great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our Government."

Similarly, in *Terrace vs. Thompson*, 274 Fed. 841, decided in 1921, District Judge Cushman, in considering the validity of the Washington Alien Land Law, held that a Japanese was not a white person within the contemplation of section 2169. This opinion was concurred in by Circuit Judge Gilbert and District Judge Neterer.

The foregoing authorities represent substantially all of the cases in which the lower federal courts have had occasion to construe section 2169 since the passage of the Act of 1875. We have cited thirty decisions. No court has ever adopted the construction contended for by petitioners, *i. e.*, that the section now has no practical significance. Twenty-eight courts have held that section 2169 restricts the right of naturalization to those aliens who are members of races generally regarded as Caucasian, either by direct scientific inquiry, or by centuries of assimilation, which constitutes a substantial equivalent thereto. One court has restricted the scope of the section still further by limiting the clause to the European races; still another has further imposed the limitation of construing the phrase after including those persons generally regarded as white persons. If either of the two latter tests be applied, the petitioners must obviously fail, since the Japanese are not a European race, and neither are they at the present time generally regarded as members of the white race. There remains then the question of whether the Japanese may properly be regarded as Caucasian, either ethnologically or by assimilation and historical recognition. The unanimous verdict of the courts is to the contrary.

(2) *The status of the Japanese.*

There remains then the question of whether the Japanese can be

considered to be persons of the Caucasian race. If they cannot be so considered, the writ should be denied.

a. *Judicial authorities.*

The cases upon this subject have already been considered in connection with the general construction of the section. We have found no adjudicated case in which it has been held that a Japanese is a free white person within the statute. The following decisions either directly or by way of dictum have held the contrary: *In re Saito*, 62 Fed. 126; *In re Kumagai*, 163 Fed. 922; *In re Knight*, 171 Fed. 299; *Bessho vs. United States*, 178 Fed. 245; *In re Young*, 195 Fed. 645, 198 Fed. 715; *In re Ozawa*, 4 Hawaii Dist. 643; *Terrace vs. Thompson*, 274 Fed. 841; *Porterfield vs. Webb*, 279 Fed. 114; *In re Narasaki*, 269 Fed. 643.

b. *Scientific authorities.*

We are somewhat in doubt as to the position which counsel for petitioners takes upon this phase of the case. In the Ozawa brief the position is taken that the Japanese are free white persons of Caucasian origin, even if we accept the controlling judicial construction of the section. Petitioners' main brief, upon the other hand, seems to abandon this theory and to concede that the Japanese are probably primarily of Mongolian origin, a race always classified as the yellow race as distinguished from the white or Caucasian race (Petitioners' Brief, pp. 20 and 21). We assume that it is intended to present both views in the alternative.

While it is perhaps true that the origin of the Japanese race has never been definitely established by ethnologists, it is also true that they are quite generally agreed that the Japanese race proper is not of white or Caucasian root-stock, notwithstanding the quotations in the Ozawa brief from the unpublished letters and addresses of one David Munro. Speaking generally, it may be said that the scientists have reached the conclusion that the islands of Japan were originally inhabited by a race of aborigines known as the Ainos, whose origin is practically unknown, but who appear to have had many of the physical characteristics of the Caucasians. They are also agreed that at a somewhat prehistoric age these islands were invaded by the ancestors of the present Japanese, who appear to have been in part Mongolian and in part Malay. After centuries of warfare the Ainos, like the American Indian, have been generally exterminated, so that in 1906 it was said by Professor Baelz, a professor of the Imperial Japanese University from 1876 to 1902, that there were then in Japan not over 17,000 remaining survivors of this race. (Smithsonian Institute Reports, 1907, p. 526.)

The overwhelming consensus of scientific opinion, however, is that there is a great difference between the Ainos and the Japanese; for instance, Professor Baelz states that the Ainos will soon disappear as a race "because they will be gradually absorbed by the Japanese." Likewise, Professor Katsuro Hara, of the Kyoto Imperial University, in his Introduction to the History of Japan, in discussing the Ainos says (p. 30):

"The only thing virtually agreed to by all investigators engaged in ethnological inquiry concerning Japan is that the Ainu is the aboriginal stock, and that the Japanese so-called belongs to a stock different from the Ainu."

The following excerpts illustrate the result of scientific investigation up to the present time:

Encyclopaedia Britannica (1910), 11th Edition:

Under title "Ethnology" divides mankind into three primary divisions:

Caucasic, Mongolic and Negroid, and specifically includes Japanese under Mongolic division.

Under the title "Japan", it is said that the Japanese race is made up of (1) Ainos; (2) Manchu-Koreans; (3) Mongols, and (4) Malays. Regarding the Ainos, says:

"These people—the Ainu—are usually spoken of as aborigines of Japan. They once occupied the whole country, but were gradually driven northward by the Manchu-Koreans and the Malays, until only a mere handful of them survived in the northern Island of Yezo. * * * The Ainu suggests much closer affinity with Europeans than does any other of the types. * * * It is not to be supposed, however, that these traces of different elements indicate any lack of homogeneity in the Japanese race. Amalgamation has been completely effected in the course of long centuries, and even the Ainu, though the small surviving remnant of them now live apart, have left a trace upon their conquerors."

Encyclopedia Americana (1920), p. 549:

Under title "Ethnology" outlines the following ethnographic scheme: European, or white; African-negro, or black; Asiatic-Mongolian, or yellow; American or coppery and Oceanic or dark.

Regarding the Mongolian race (p. 552) it says:

"The Asian, or Mongolian race, is made up of two divisions—the Sinitic and Sibiric. * * * The Sibiric branch of this race is largely located north of the mountains of central Asia ranging with the Arctic Circle from the Pacific to the Atlantic Ocean. * * * The Japanese and Koreans constitute the Japanese group."

Under the title "Japan" at page 628, Shogoro Tsuboi, professor of ethnology in the Imperial University, Tokyo, speaks of a prehistoric people called by the later Ainus "Koropokguru," from which the Eskimos and Aleuts sprang, and continues:

"* * * The Japanese language is closely related to Korean. In Japanese manners and customs some likeness to those of Korea and Malay are found. It is quite probable that the Ainu, Malay and continental elements are the chief, though not necessarily the only, constituents of the Japanese."

Nelson's Loose-leaf Encyclopedia, under title "Japan," at page 567, says:

"Although, with regard to civilization, Japan has made great and substantial progress, the Japanese are nevertheless still an Asiatic nation. *Language and anthropology show that the predominant element in the Japanese race is Mongol.*"

New International Encyclopedia (1915), p. 584, under title "Japan-Ethnology", says:

"The largest factor in the production of the Japanese is to be traced back to the Mongolian race of the adjacent continent, a view confirmed by the physical characteristics of a considerable portion of the population at the present time. * * * There are recognizable three physical types—an Ainu type, chiefly characteristic of north Japan; a Manchu-Korean in the regions nearest Korea; and a Malayo-Mongolic in the center and east. The Korean-Manchu type seems to go back, like the primitive Chinese, to a Mongolian ancestry with a strain of proto-Caucasian blood, while the Ainus are perhaps allied to the most primitive Caucasians; but such opinions must be accepted with caution."

Deniker, "The Races of Man" (1901), pp. 371-372:

Divides Asia into five races: (1) Dravidian; (2) Assyroid; (3) Indo-Afghan; (4) Ainu and (5) Mongolian. Geographically speaking, he says northern Asia is composed of (1) Yaniseians or Tubas; (2) Palaesiaties and

(3) Tunguses. The Palaesiaties, he says, include the Ainus, and he does not specify that they were "white." He says:

"The Ainus, who are classed among the Palaesiaties, inhabit the north and east of the Island of Yezo, the south of Saghalien, and the most southern islands of the Kuriles. They form a group by themselves, differing from all other peoples of Asia. Their elongated heads, their prominent superciliary ridges, the development of the pilous system, the form of the nose, give to them some resemblance to the Russians, the Todas and the Australians, but other characters (coloration of the skin, prominent cheek-bones, short stature, frequent occurrence of the *os japonicum*, etc.) distinguish them from these peoples and affords grounds for classing them as a separate race. * * * It is calculated that there are about 18,500 Ainus (of whom 1300 are in the Island of Saghalien) at the present time; their number at Yezo has remained stationary for several years. * * * Their religion is pure animism. * * * The Ainus, like most Asiatic peoples, such as the Giliaks, Tunguses, etc., have a special veneration for the bear. * * * The Ainu language is agglutinative, and has no analogy with any known language."

At page 387 this author says:

The fine type of Japanese which may be chiefly observed in the upper classes of society is characterized by a tall slim figure, a relative dolichocephaly, elongated face, straight eyes in the men, more or less oblique and Mongoloid in the women, thin, convex or straight nose, etc. The coarse type common to the mass of the people is marked with the following characters: a thickset body, rounded skull, broad face with prominent cheek bones, slightly oblique eyes, flattish nose, wide mouth.

"These two types have been the result of crossings between Mongol sub-races and Indonesian or even Polynesian elements. The influence of the Ainu blood is shown only in northern Nippon."

Bettany, "The World's Inhabitants," 3rd Ed. (1892), p. 384, says:

"Japan includes the flower of the Mongolian people. * * * We can look back to a period when tribes resembling the remaining Ainus of Yezo inhabited such parts of the islands as were redeemed from forests. They were gradually driven northwards by the ancestors of the present Japanese. That these were in part of Chinese origin cannot be doubted; but how far the Manchus, Coreans, Malays and Papuans may have a claim to share in the Japanese ancestry cannot be settled."

"Dictionary of Races or Peoples" (Report of Immigration Committee, Senate Doc. 662, 61st Cong., 3rd Session):

Adopts Blumenbach's classification of mankind into five races. The primary classification, it is pointed out, is physical or somatological, and the treatise then proceeds to subdivide each race into groups based on linguistic differences, saying:

"The practical arguments for adopting such a classification are unanswerable."

It then by means of a table shows how the anthropologists and ethnologists have divided the races:

Brinton divides mankind into five races, and includes Japanese and Korean under the Sibiric branch of the Mongolian.

Keane makes four classifications, combining the Malay and Mongolian as one.

Blumenbach makes the five commonly used divisions.

Deniker, on the other hand, had twenty-nine classifications.

Huxley's divisions were Negroid, Australoid, Melanchroid, Xanthrochroid and Mongoloid.

At page 85 this work says:

"With the exception of the 'Arctic group,' the Japanese and Koreans form the easternmost group of the great Sibiric branch, which with the Sinitic branch (Chinese, etc.) constitutes the Mongolian race. As was said in the article on Chinese, the Japanese and Koreans stand much nearer than the Chinese, especially in language, to the Finns, Magyars and Turks of Europe. The language of all these peoples belongs to the agglutinative family, while Chinese is monosyllabic. Although many people may mistake a Japanese face for Chinese, the Mongolian traits are much less pronounced. The skin is much less yellow, the eyes less oblique. The hair, however, is true Mongolian, black and round in section, and the nose is small. These physical differences no doubt indicate that the Japanese are of mixed origin. In the south there is probably a later Malay admixture. In some respects their early culture resembles that of the Philippines of today. Then there is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian-like people in appearance in eastern Asia. They have dwindled away to less than 20,000 under the pressure of the Mongolian invasion from the mainland, but they have left their impress upon the Japanese race."

Article by Captain F. Brinkley entitled "Primeval Japan," in Annual Report of Smithsonian Institute, year ending June 30, 1903:

"The student must be content to regard the annals of primeval Japan as an assemblage of heterogeneous fragments from the traditions of South Sea Islanders, of central Asian tribes, of Manchurian Tartars and of Siberian savages, who reached her shores at various epochs * * *.

"The first were the Koro-pok-guru or cave men. The second were the Ainu, a flat-faced, heavy-jawed, hirsute people who completely drove out their predecessors and took possession. The Ainu of that period had much in common with animals. They burrowed in the ground for shelter; they recognized no distinctions of sex in apparel or of consanguinity in intercourse; they clad themselves in skins; they drank blood; they practiced cannibalism. * * * They * * * unceasingly resisted the civilized immigrants who subsequently reached the islands, they were driven northward by degrees and finally pushed across the Tsugaru Strait into the Island of Yezo. The long struggle, and the disasters and sufferings it entailed, radically changed the nature of the Ainu. They became timid, gentle, submissive folk; lost most of the faculties essential to a survival in the racial contest, and dwindled to a mere remnant of semi-savages, incapable of progress, indifferent to improvement, and presenting a more and more vivid contrast to the energetic, intelligent and ambitious Japanese.

"But these Japanese—who were they originally? Whence did the three or more tides of immigration set which ultimately coalesced to form the race now standing at the head of Oriental peoples * * *? Kampfer persuaded himself that the primeval Japanese were a section of the builders of the Tower of Babel. Hyde-Clark identified them with the Turano-Africans who traveled eastward through Egypt, China and Japan. Macleod recognized in them one of the lost tribes of Israel. Several writers have regarded them as Malayan colonists. Griffis was content to think that they are modern Ainu and recent scholars incline to the belief that they belonged to the Tartar-Mongolian stock of central Asia.

"The theory which seems to fit the facts best is that the Japanese are compounded of elements from central and southern Asia. * * * The

Asiatic colonists arrived via Korea. But they were neither Korean nor Chinese. * * * Their birthplace was somewhere in the north of central Asia. As for the south Asian immigrants, they were drifted to Japan by a strange current called the 'black tide' which sweeps northward from the Philippines."

Dr. E. T. Hamy in an article entitled "The Yellow Races," appearing at page 505, Smithsonian Reports (1895), says:

*"The Koreans and Japanese belong without contradiction, at least up to a certain point, to the great mass of peoples of the yellow race. * * ** It can hereafter no longer be doubted that the population is connected by bonds of kinship with its neighbors on the yellow continent. * * * The Malays, whose fleets ravaged the coasts of Tsiampa as late as the eighth century * * * have left behind numerous traces of their intervention.

"One last national element, which has remained very modest in its influence, because it was driven out, with a kind of repugnance, by the Japanese, is the Ainu, the hairy race of Kuriles, of Sakhalin and Yezo. I have told you what little I know of these singular islanders, whom for the moment I am utterly unable to classify. The Ainos are, on the average, akin to the Chinese by their cephalic index, and I have provisionally placed them between the Chinese and the Eskimo." (Italics ours.)

An article by Dr. E. Baelz, professor of Imperial University, Tokyo, entitled "Prehistoric Japan," appearing in Smithsonian Reports (1907) is enlightening. This author distinguished in Japan three essential elements: (1) the north or true Mongolian; (2) the south or Malayan and (3) the Aino, and adds:

"Probably there is an admixture of Hindu or foreign blood in many Malays."

He vigorously combats the doctrine that the Japanese are widely different from the Chinese, saying:

"Investigators were too much influenced by outward appearances, especially by dress and methods of wearing the hair. * * * To contradict this I have the testimony of any number of Japanese and Koreans that they themselves cannot distinguish one from the other if costume and hair-dressing are the same. * * * Therefore I cannot understand how Donitz can say 'the Japanese are so different at first sight from the Mongolians who inhabit the neighboring mainland that it is hard to conceive how there could be any direct connection between them.'"

Regarding the Ainos this author says:

"They will soon disappear as a race, not, however, because they will be stamped out by encroaching civilization, but because they will be gradually absorbed by the Japanese. Inter-marriage is now of almost daily occurrence. * * * The Japanese type generally prevails among these halfbreeds."

A number of historical writers are of more than passing interest. K. C. Latourette, in "The Development of Japan" (1918), p. 18:

"The Japanese of today are a mixed race, and are the result of the coalescence of several migrations. * * * The Manchu-Korean and Malay stocks predominate, with the balance in favor of the latter, but there are as well traces of infusion of other blood, part of it Mongol, part of it still undetermined. Some enthusiasts have even seriously claimed to have found an Indo-European admixture. In language the Japanese more nearly resemble some of the groups of northern and central Asia, and especially Korea, but there are also likenesses to the Malay tongues."

"An Introduction to the History of Japan," by Katsuro Hara (1920), says: "Who are the Japanese? We are almost at a loss to decide to which

assertion we can most agreeably give out countenance without the risk of receiving an immediate setback. So I shall be content to state here only those hypotheses which may be considered safe, although they may not rise above the level of conjecture."

He leaves in doubt the question as to the origin of the Ainu, saying: "Even the supposition that the Ainu belongs to the Aryan stock cannot be rejected as quite a worthless speculation."

Continuing, he says:

"We have here designated the vanquishers of the Ainu by the name of Japanese. * * * If it is most probable that the Japanese is a heterogeneous race, then what are the elements which constitute it? * * * Summing up, I cannot but think that the prehistoric immigrants into our country from the south were by no means a negligible factor in constructing the island nation, though the majority of immigrants might have come from the nearest continental shores, and in his majority it is not necessary to exclude the Chinese altogether."

"A History of Japan," by James Murdock (1910), page 35, says:

"The inhabitants of the Luchus, of Satsuma and the rest of the southern Kyushu and the peoples of the old Hans in Korea are, or were, of the same stock—either Malay or Indonesian. And just as the people of the three Hans supplied the basic element in the Korean language, so those of Luchu and Kyushu have furnished the element in the tongue of modern Japan. Furthermore they have furnished Japan with her Imperial house and with the greater part of her aristocracy and ruling caste."

He then points to the presence of another class of inhabitants in the State of Idzumo, presumably from the continent, and of Mongolian origin, and continues:

"The combination of this branch of Kyushu, Kumaso and the Idzumo men proved irresistible; they pushed their conquests to eastward along both shores of the inland sea and ultimately established a strong central state in Yamato at the expense of the Ainu."

Brinkley's "Japan" (1904), at page 70, says:

"By the Japanese themselves it is stoutly affirmed that not the smallest mark of consanguinity can be traced between them and the Ainu or Yezo tribe. Unquestionably the languages of the two have nothing in common and so far as outward appearance is concerned the dissimilarity is conspicuous. Nevertheless, certain German anthropologists have placed on record their opinion that the Ainu are Mongolian."

Brinkley then proceeds to disprove this and says:

"We may accept it as an established fact that the Japanese and the Ainu have no affinity whatever."

He proceeds:

"*Western ethnologists are tolerably agreed that Jimmu (first Emperor) and his followers were Mongolian.* There have been attempts to identify them with the lost tribes of Israel; with the Aztecs and with other peoples of the Occident. In Japan there is a belief that they were Manchurians; that is to say, a race which originally emigrated from a remote part of India, a race distinct from the Chinese, of which some settled in Manchuria, spread thence to the northeast China and finally passed to Japan. It must be agreed for the moment to leave the problem partially unsolved; noting, however, that though the Japanese Shizoku cannot be absolutely identified with the Mongolian of today, the differences are not so great as to be incapable of reference to the modifying influences of environment acting through long centuries. At all events we may conclude that the final immigrants,

Jimmu and his followers of the so-called Takana-no-para folk, found on their arrival a Malayan people inhabiting the southern and central parts of Japan, and an arctic tribe, the Ainu, living in the north, and that while they amalgamated with the former, they drove out the latter, treating them as a wholly inferior race, the result being that whereas the Japanese proper show plainly enough the blending of the Mongolian and Malayan types, they show no affinity whatever with the Ainu." (Italics ours.)

"A Handbook of Modern Japan," by E. W. Clement (1904), at page 44, says:

"It is well known that the Japanese are classed under the Mongolian (or yellow) race. They themselves boastfully assert that they belong to the 'golden race,' and are superior to Caucasians who belong to the 'silver race'! As Mongolians they are marked, not only by a yellowish hue, of many shades from the darkest to the lightest, but also by straight black hair (rather coarse), scanty beard, rather broad and prominent cheek bones, and eyes more or less oblique. Some think that the Japanese people show strong evidence of Malay origin, and claim that the present Emperor, for instance, is of a striking Malay type. It is not impossible that Malays were borne in the 'Japan Current' northward from their tropical abodes to the Japanese islands; but there is no historical record of such movement. Therefore the best authorities, like Rein and Baelz, do not acknowledge more than slight traces of Malay influence." (Italic ours.)

At page 45 of this work is found the following note:

"Various Impressions" is the title of an address delivered at a meeting of the Imperial Society by Dr. Nitobe. * * * Dr. Nitobe gave an account of his travels in the South Pacific. He visited Java, many other islands, and Australia. At Java he felt persuaded that an eminent French ethnologist, who not long ago said that, as the result of much investigation, he had come to the conclusion that the Japanese race was 6/10 Malay, 3/10 Mongolian and 1/10 mixed, was right. Among the mixed element there was an Aryan element which came from India and a Negrito element. 'During my travels in the South Pacific Islands I was repeatedly struck by the similarity of Malay customs to our own. In the structure of their houses even this was very manifest. * * *'"

"The Japan Year Book," 1913-14, printed in English at Yokohama, at page 13, says:

"The origin of the Japanese is obscure * * *. The following are the principal theories advanced:

"1. That the Japanese owe a good deal of their composition to the Ainu, the aborigines of Japan, who originally entered the country from the mainland of Siberia. This theory has now been practically abandoned, in view of the researches of Baelz, Aston, Batchelor and others.

"2. That the Japanese are originally of Malay stock.

"3. That the Japanese are a mixture of Tartar-Mongolian races from Central and Southern Asia, a theory supported by Brinkley, Griffiths, Max von Brandt and others.

"4. That the Japanese are purely Mongols. This theory emanates from Baelz and Rein, and is supported by Chamberlain.

"5. That the Japanese are a mixture of a Caucasian, Negrito, Mongolian and Sinitic, the Negrito elements being originally found in Japan previous to the immigration from the mainland of Asia, in which all authorities believe. This theory is based on the researches of Monro.

"The sum of all the above theories is that the Japanese race consists of a

mixture of races all Asiatic in origin, and that therefore the Japanese are an Asiatic race.

"Recently a Russian student has advanced the theory that the Japanese have in part blood of the Ugrian stock, and are similar to the Finns and certain nomadic tribes of north and central Russia. Savoff, the author of this theory, bases his belief principally on the evidence of language."

At page 15 it is said:

"The Ainus are a distinct race from the Japanese, and there has been, comparatively speaking, little intermarriage between the two races.

"Undoubtedly they are a dying race, and the years cannot be many before they will be entirely wiped from the face of the earth. For the present they are mostly interesting as the remains of a purely barbaric race."

"The Japanese Nation," a noted and widely quoted work by Inazo Nitobe (1912), says, in part:

"There seems as yet little philological affinity established between the continental peoples and the Japanese. In this respect a relationship with the Malay race promises to be closer, though as yet no definite conclusion is reached.

"But before the Malays or the Chinese reached the shore of Japan, a hairy race of northern blood, large in numbers, and known as the Ainu, seem to have held the entire country in possession."

He then dwells upon the conflict of authority as to the exact origin of the Japanese, concluding:

"Suppose we could obtain an average for the present generation, so unstable are human types—as Boas, Bolk and other ethnographers have demonstrated—that a few generations hence will show a marked difference in Japanese anatomy. * * * It has long been and probably still is no easy task to assign a definite place to the Japanese in the general scheme of ethnic classification. We used to be dumped into the heap of linguistic non-conformists, under the name of Turanian. * * * The Japanese, as they are, according to the carefully compiled table of Professor Amos W. Butler, belong to what he calls the Sibiric branch of the Asiatic race, and with the Koreans constitute the Japanese stock, quite apart from the Chinese, Mongolic and the Tartaric. Perhaps this classification is the most precise."

This author means the Sibiric branch of the Mongolian race as distinguished from the Sinitic branch, to which the Chinese, Mongols and Tartars belong.

He says further:

"Philologically Japanese is a forlorn and solitary orphan, that can claim no relationship, either lateral or collateral, with any other language."

Basing his remarks upon researches by Baelz, Professor David Murray, in "The Story of Japan" (Famous Nations), at page 29, says the Ainus belong to the northern group of Mongolians who inhabit the regions about Kamtschatka and adjacent parts of Siberia. He says the later Japanese belong to two distinct immigrations, the earlier one to the Province of Izumo from Korea, belonging to a rougher and more barbarous tribe of the Mongolian race, and the later one to the Island of Kyusku, either from Korea or through Formosa or the Ryuku islands. The second immigration came from the more cultured tribe of the Mongolian race, although there is some probability that they were of Malay origin. The author takes the view that both immigrations were of Mongolians, saying:

"That they came from the same race is evident from their understanding of the same language, and having habits and methods of govern-

ment which were not a surprise to the newcomers, and in which they readily cooperated."

As the court will observe from the resume made in the "Japan Year Book of 1913," the only reputable authority who ascribes Caucasian origin to the Japanese is Munro, and even he appears to concede the existence of marked Mongolian and Malay strains. Mr. Monro's speculations will be found set forth quite extensively upon pages 58 to 67 of the Ozawa brief. They find little or no support in any of the standard authorities, but are based almost entirely upon similarity in language with the Polynesians and certain prehistoric ruins.

However, for the purpose of this action it is not necessary for the court to definitely pass upon the correctness of the theories of Dr. Monro or any of the other scientists. Whatever may have been the origin of the Japanese in prehistoric times, they have for a period of over 2000 years constituted a homogeneous race which has been regarded as yellow or Mongol by all the European races since we first had any knowledge of the existence of Japan. The debates in Congress to which we have referred clearly indicate an attempt to exclude the Asiatics or yellow races. Popular opinion has always followed that view, and it has been further supported for the past fifty years by an almost unbroken line of judicial authorities. Since the problem before the court is one of statutory construction and not of scientific inquiry, it is submitted that that view should be adopted, especially when it finds support in at least the numerical weight of scientific authority.

IV.

THE JAPANESE ARE NOT ASSIMILABLE.

Beginning upon page 67 of the Ozawa brief, under the head "The Japanese Are Assimilable," there is found a discussion of the legislative policy of admitting the Japanese to citizenship and a tribute to the virtues of the members of that race. Since the question is merely one of statutory interpretation and not of a legislative expediency, we are somewhat in doubt as to whether we may, with propriety, discuss this question. Since, however, the discussion is invited by petitioners, and the decision in the case is of the gravest importance to the citizens who reside upon the Pacific Coast and in the Territory of Hawaii, we feel that we should not permit this statement to go unchallenged. The conclusion of counsel upon this point is based upon certain statistics relating to crime taken from the Report of the Governor of Hawaii to the Secretary of the Interior in 1916 and an unpublished paper said to have been written by one M. M. Scott, the principal of a high school in the city of Honolulu. This argument, we think, is based upon an entire misconception of the question or of the things which are necessary in order to permit assimilation between persons of different races. The assimilability of a foreign race is not established by demonstrating their theoretical fitness for citizenship because the problem is a practical one which cannot be solved by applying rules of morality. The very virtues which are referred to in the brief as characteristics of the Japanese race, such as their industry and economic efficiency, are a not inconsiderable factor in the prevention of any successful assimilation when added to the racial difference between the Japanese and the citizens of this country. As was well said by Professor Robert E. Park of the University of Chicago in his Introduction to "The Japanese Invasion," by J. F. Steiner:

"It has been assumed that the prejudice which blinds the people of one

race to the virtues of another, and leads them to exaggerate that other's faults, is in the nature of a misunderstanding which further knowledge will dispel. This is so far from true that it would be more exact to say that our racial misunderstandings are merely the expression of our racial antipathies. Behind these antipathies are deep-seated, vital and instinctive impulses. These antipathies represent collision of invisible forces, the clash of interests, dimly felt but not yet clearly perceived. They are present in every situation where the fundamental interests of races and peoples are not yet regulated by some law, custom, or any other *modus vivendi* which commands the assent and the mutual support of both parties. We hate people because we fear them; because our interests, as we understand them at any rate, run counter to theirs."

The same author, in an article entitled "Racial Assimilation in Secondary Groups," *American Journal Soc.*, March, 1914, p. 610, said:

"The chief obstacles to the assimilation of the negro and the Oriental are not mental, but physical traits. It is not because the negro and the Japanese are so differently constituted that they do not assimilate. If they were given an opportunity, the Japanese are quite as capable as the Italians, the Armenians or the Slavs of acquiring our culture and sharing our national ideals. The trouble is not with the Japanese mind, but with the Japanese skin. The Jap is not the right color. The fact that the Japanese bears in his features a distinctive racial hall mark, that he wears, so to speak, a racial uniform, classifies him. He cannot become a mere individual, indistinguishable in the cosmopolitan mass of the population, as is true, for example, of the Irish, and, to a lesser extent, of some of the other immigrant races. The Japanese, like the negro, is condemned to remain among us an abstraction, a symbol, and a symbol not merely of his own race, but of the Orient and of that vague, ill-defined menace we sometimes refer to as the 'Yellow Peril.' This not only determines to a very large extent the attitude of the whole world toward the yellow man, but it determines the attitude of the yellow man to the white. It puts between the races the invisible but very real gulf of self-consciousness."

Mr. J. F. Steiner, in his work entitled "The Japanese Invasion," which is quite sympathetic towards the Japanese, in chapter 10 reaches the conclusion that there can never be a true assimilation so long as the present physical difference exists between the Caucasian and the Japanese, saying (p. 180):

"It is not a question whether their physical characteristics are attractive or repulsive to Americans. The problem is not lessened by the fact that the color of the Japanese is hardly more pronounced than is that of the people of southern Europe. Even when due allowance is made for their changes in physical appearance brought about by their reaction to their new environment—changes in the cast of countenance and in the peculiar mannerisms which play an important part in intensifying racial distinctions—the fundamental fact still remains that their physical type marks them out as Orientals wherever they are, and suggests to us all the undesirable connotations that are bound up with the word 'Asiatics.'"

We might multiply authorities to establish the proposition that there can be no real assimilation of an alien race unless it is accompanied by a social assimilation which destroys the marked physical characteristics which differentiate races. It is unnecessary to do so, because the judicial knowledge of the court with respect to the problem of the negro, of the Indian and the Chinaman in the United States will sufficiently demonstrate this fact.

Social assimilation can only be accomplished by intermarriage, since that

is the only way in which the physical characteristics which create a racial prejudice can be obviated. Few authorities, even those most favorable to the Japanese, are willing to admit the possibility of any general intermarriage between the Japanese and the Caucasian race. As early as 1892 Herbert Spencer, in a private letter written to Baron Keneko, which was first made public in the *London Times* of January 22, 1904, said:

"To your remaining question respecting the intermarriage of foreigners and Japanese, my reply is that, as rationally answered, there is no difficulty at all. It should be positively forbidden. It is not at root a question of social philosophy. It is at root a question of biology. There is abundant proof, alike furnished by the intermarriages of human races and by the interbreeding of animals, that when the varieties mingled diverge beyond a slight degree *the result is inevitably* a bad one in the long run. I have myself been in the habit of looking at the evidence bearing on this matter for many years past, and my conviction is based on numerous facts derived from numerous sources. * * * By all means, therefore, peremptorily interdict marriages of Japanese with foreigners."

Lawton, in volume 2, page 761, in his work on "Empires of the Far East," reaches the same conclusion, stating:

"For it is indisputable that the marriage of a western woman to a Japanese lowers her status in society and exposes her to the indignities that are inseparable from the operation of the Japanese social system."

Even Dr. Gulick, for many years an ardent advocate of the virtues of the Japanese, in his book, "The American Japanese Problem," states:

"It may be set down as a universal rule that intermarriage of races should follow, not precede, social assimilation."

The court will find that subject quite thoroughly considered by Mr. Steiner in chapter 4 of his work entitled "The Japanese Invasion."

References might likewise be made to the report of the hearings held before the House committee on immigration and naturalization with respect to the Japanese problem, held on the Pacific Coast in July, 1920, where even the Japanese admitted the practical impossibility, at least at the present time, of any general intermarriage between the races, although they insisted that there were no biological objections.

Without intermarriage there can be no social assimilation, and without social assimilation there can be no real assimilation. The refusal of a numerically dominant race to socially assimilate with an alien population must inevitably prevent the latter race from ever becoming assimilated, because assimilation is an evolutionary and educational process which can never be accomplished without mutual co-operation between the races. This is more particularly true in cases where the alien race is of high mentality, for the reason that they are not content to accept a subordinate status with which a partial assimilation may sometimes be accomplished.

It is no reflection upon the Japanese to say that they will never be assimilated until socially recognized. Refused social recognition, it is inevitable that they will continue to be Japanese in thought and action, and that they will not accept American ideas or recognize substantial obligations to the American Government, because the human mind generally determines abstract things by concrete facts. Whoever may be at fault, therefore, the fact cannot be successfully controverted that the Japanese have not, in fact, been assimilated, and that if social recognition be required as a condition precedent they will probably never be assimilated. The hearings before the House committee, *supra*, demonstrate this quite conclusively. These hearings show the general consensus of the mass of the people who come in

contact with large numbers of the Japanese to regard them purely as Asiatics, and not as Americans, either actual or potential. It is true that many witnesses, notably educators and clergymen, criticize this attitude, while others think that the Japanese are economically necessary to the development of our agricultural resources. Scarcely any were found, however, who denied the inescapable fact that a social and racial gulf exists between the two races which has steadily increased in proportion to the increase in our Japanese population. It is unnecessary for us to analyze the testimony of those who oppose the further immigration of the Japanese or to determine whether their apprehensions were justified in fact. The court will find those conclusions set forth in the report of the committee. In the final analysis the problem is a practical one, which cannot be answered by assuming all men to be perfect. The granting of political equality, while desirable in the case of a race capable of assimilation, in the case of a race not so capable, simply intensifies the problem. The history of the South after the right of suffrage was conferred upon the negro is ample proof of this fact. Facts are stubborn and unescapable, and they are not met by showing that from the standpoint of morality they should not exist. It is unnecessary for us here to attempt to apportion the blame for this prejudice, because the fact would remain the same, even though we should absolve the Japanese from all responsibility. If the decision of the case should turn upon the possibility of the successful assimilation of the Japanese, the writ should be denied, because the Japanese will never be assimilated in this country, at least in our generation.

We do not mean by the foregoing to admit that there is no real objection to Japanese assimilation other than racial prejudice and economic jealousy upon the part of the whites. The hearings had before the House committee revealed many other factors which might be worthy of serious consideration by a legislative body. We feel, however, that we have gone as far as is proper in this respect, indeed even farther than we would otherwise have done had the point not been suggested in the Ozawa brief.

The argument is also made that it would be presumed that the superior court of Pierce County found these petitioners to be Ainos, and therefore of the Caucasian race, when it naturalized them. There are three answers to this contention: (1) the pleadings admit the petitioners to be Japanese, and Ainos have always been recognized as a different race than the Japanese, although owing allegiance to that nation; (2) the origin of the Ainos has never been established, and since they owe allegiance to the Japanese, their status must be considered the same, and (3) the record does not include the order of naturalization made by the superior court of Pierce County, and since that judgment was declared void by the highest court of the state, if there is any presumption it must be in support of the conclusion of the latter court, where the record is incomplete.

The judgment should be affirmed.

Respectfully submitted,

L. L. THOMPSON,

Attorney-General of Washington,

Attorney for Respondent.

E. W. ANDERSON, of Counsel.

4. DECISION OF THE COURT.

(November 13, 1922.)

Mr. Justice Sutherland delivered the opinion of the court.

This case presents one of the questions involved in the case of *Takao Ozawa vs. The United States*, this day decided, viz.: Are the petitioners, being persons of the Japanese race, born in Japan, entitled to naturalization under section 2169 of the Revised Statutes of the United States.

Certificates of naturalization were issued to both petitioners by a superior court of the State of Washington prior to 1906, when section 2169 is conceded to have been in full force and effect.

The respondent, as secretary of state of the State of Washington, refused to receive and file articles of incorporation of the Japanese Real Estate Holding Company, executed petitioners, upon the ground that, being of the Japanese race, they were not at the time of their naturalization and never had been entitled to naturalization under the laws of the United States and were therefore not qualified under the laws of the State of Washington to form the corporation proposed, or to file articles naming them as sole trustees of said corporation. Thereupon petitioners applied to the supreme court of the state for a writ of *mandamus* to compel respondent to receive and file the articles of incorporation, but that court refused and petitioners bring the case here by writ of *certiorari*.

Upon the authority of *Takao Ozawa vs. The United States*, *supra*, we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the superior court, admitting petitioners to citizenship, that court was without jurisdiction and its judgment was void. (*In re Gee Hop*, 71 Fed. Rep. 274; *In re Yamashita*, 30 Wash. 234.)

The judgment of the supreme court of the State of Washington is therefore affirmed.

A true copy.

CHAPTER III.—SATO CASE.

ICHIZO SATO, Petitioner and Appellant, vs. HARRY W. HALL, Clerk of the County of Sacramento, Defendant and Respondent.

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT.

No. 2238.

1. DECISION OF APPELLATE COURT.

OPINION.

Appeal from a judgment of the superior court refusing a writ of mandate. The petitioner is a member of a yellow race and a native of Japan. On the 21st day of January, 1919, he was admitted to citizenship by the United States district court of the Territory of Hawaii and a certificate of citizenship was thereupon issued to him. This certificate recites that he is a member of a yellow race and that at the time of his admission he was a subject of the Emperor of Japan. He presented his certificate to the county clerk, above-named respondent, and demanded that that official place his name on the register in order to qualify him to vote. The clerk declined to accede to this demand and pleads as a justification for his action that members of the yellow races are not entitled to naturalization and that the order of the court admitting him is void on its face.

The appellant contends that the order admitting him to citizenship is a final judgment of a court of competent jurisdiction and that this judgment is conclusive as against collateral attack. Where a court has jurisdiction of the parties and of the subject matter this contention is sound, but a judgment that shows on its face that it is invalid may be assailed in any court. This judgment shows that the appellant is a member of a yellow race. Beyond a peradventure this showing renders the judgment totally void, unless its integrity is preserved by some one of the acts to be hereinafter noticed. This principle that a judgment which shows its infirmities on its face may be assailed as to such infirmities at any time and in any court is too well established to require any citation of authorities in its support. That appellant is not entitled, under the general naturalization laws, to the privileges of citizenship is conclusively shown by section 2169 of the Naturalization Laws, which reads as follows:

"Sec. 2169. The provisions of this act shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

Members of the Japanese race have never been held to be members of the white race and still less are they members of the black race. Waiving any extended inquiry into the chromatic classifications of the human race, it is sufficient to say that, under the Blumenbach and all later classifications, the members of the Japanese family have always been classed as yellow in color—by the former as belonging to the Mongolian race and by the latter as the Ural-Altaic. But by no authority have they ever been classed as

Caucasian. But whatever the true ethnological rule, the question is settled so far as this case is concerned by the express declaration in appellant's certificate of naturalization that he is yellow in color.

The appellant very strenuously insists that, notwithstanding the provisions of section 2169, he is entitled to naturalization under the Act of May 9, 1918. (Supplement of 1918 to Federal Statutes, Annotated, p. 488.) His certificate recites that he was admitted under the provisions of this act.

Subdivision 7 of section 4 of the act is the provision under which he claims this right. Said subdivision is quite lengthy and much of it is not relevant to this inquiry, and we will summarize it by saying that the following described persons are, under varying provisions, entitled to naturalization:

- a. "Filipinos serving for three years in the Navy;"
- b. "Any alien" now or hereafter serving in the Army or Navy;
- c. Any Porto Rican now or hereafter serving in the Army or Navy;
- d. "Any alien" serving in either the Army or Navy during the present war;
- e. "Any alien" who has served in either the Army or Navy and has re-enlisted, etc. (Not relevant to this case.)
- f. "Any alien" above described may file his petition in the most convenient court.

It may be remarked, since the fact will be found material in the consideration of said subdivision 7, that citizens of the Philippine Islands are not "aliens", nor yet are they citizens of the United States. (*In re Alverto*, 198 Fed. 688.)

Appellant's certificate of naturalization shows, though not very clearly, that he served in the United States Army, and it is by reason of the existence of this fact that he claims the right of naturalization under said subdivision 7.

There are, however, two other provisions of the law bearing upon the matter which will be noticed further along.

It is certainly true that the words "any alien", as used in said subdivision 7 enacted in 1918, do, when standing alone, comprehend aliens of any color, and they are clearly broad enough to justify the claims of the appellant to naturalization. They must be construed in connection with other legislation on the same subject. It happens that we have before us a condition of the law exactly parallel, so far as this principle is concerned, to that existing after the passage of the Act of Congress of July 26, 1894, and we have abundant decisions thereunder. Section 2169, limiting naturalization to the white and black races, was enacted in 1875. In fact, we may assume that it has practically been the law ever since the Act of 1802.

To show the exact parallel between the Acts of 1894 and 1918, we will quote the material parts of both:

Act of 1894: "Any alien of the age of twenty-one years and upwards, who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States."

Act of 1918: "Any alien * * * of the age of twenty-one years and upwards, who has enlisted or may hereafter enlist in the Armies of the United States * * * or in the United States Navy or Marine Corps

* * * may on presentation of the required declaration of intention petition for naturalization without proof of," etc.

It is seen that these two acts are as one in the use of the words "Any alien." If, therefore, these words had received an authoritative and well-recognized construction under the Act of 1894, then under a rule of legal construction, as well as the usual understanding of men, they must be accorded the same meaning when used by the same legislative body in the same connection in the Act of 1918. This rule is so well established by authority and is so obvious that it will be disputed by no one.

In *Bessho vs. United States*, 178 Fed. 245, the circuit court of appeals had before it the Act of 1894 and the court construed it in the light of the General Naturalization Act of 1906. In section 26 of this last act Congress expressly repealed a number of sections of the Act of 1873 (as amended in 1875), but it did not mention as repealed section 2169 above quoted. The court construed this omission as a legislative implication that section 2169 was to continue as the law. This was in 1906, and, of course, long after the enactment of the statute of 1894, under which Bessho claimed the right of naturalization. The court denied the petition upon the ground that, although he was a Japanese subject who came within the terms of the Act of 1894 as having served in the Navy of the United States, he was not entitled to naturalization because he was a member of a race other than the white and black races. Before making an application of this decision to the case at bar it is proper to remark that the Act of 1918 contains a provision to the effect that section 2169 is not repealed or enlarged thereby, the details of which will be noted presently.

If, in the Act of 1894, the words "Any alien" do not mean an alien who, under the general naturalization laws, is not entitled to naturalization, then of a practical certainty the same words, when used in the same sense in the Act of 1918, have the same meaning. * * * And in another case the court said: "A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized, even with honorable service in the Army or Navy." (*In re Knight*, 171 Fed. 299.) In a federal court in Pennsylvania (*In re Alverto, supra*) the court states: "The applicant's service in the Navy does not affect his status under section 2169. It has been repeatedly held that service in and honorable discharge from the military service of the United States does not extend the right of naturalization to those persons who are beyond its provisions under section 2169."

But this matter may be viewed from another angle. In 1862 Congress enacted a statute very similar to aforesaid subdivision 7 and to the Act of 1894, which statute reads as follows:

"Any alien of the age of twenty-one years and upward, who has enlisted or may enlist in the Armies of the United States, either the regular or volunteer forces, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition," etc.

This act was carried into the Revised Statutes as section 2166. It was not repealed by the General Naturalization Act of 1906 and it has continued to be the law from 1862 down to the present day. Section 2169 became and now is a part of the Revised Statutes. The Act of 1862 as re-enacted in the Revised Statutes received judicial construction in the instructive case entitled *In re Buntaro Kumagai*, 163 Fed. 922, in which the court holds: "As both sections are comprised in title 30, this amendment of section 2169 provides a rule of construction applicable to section 2166, and, being the latest expression of the will of Congress on the subject, it is

controlling and limits the privilege of naturalization to white persons and those of African nativity or descent." The special significance of this case lies in the fact that it deals with an act that is yet in force (Act of 1862), that is, uses the word "Any alien" and that the court construed these words to mean any alien of the white or black race. This is a demonstration that, as to this act, at least, the words "Any alien" do today mean any alien of the white or black race.

We have, then, this highly suggestive condition: The Acts of 1862 (sec. 2166, Rev. Stats.), 1894, 1906, 1914 and 1918 all use the common term "any alien", and all of them save that of 1906 refer to aliens who have served in the Army or Navy. We have shown that under the Acts of 1862, 1894, and 1906 there is no question that the words "Any alien" mean any alien of the white or black race. The matter stood in this shape when Congress enacted the Acts of 1914 and 1918, each relating to aliens who had served in the Army or Navy. We are not concerned with the Act of 1914, and it may be dismissed from further consideration. We cite it only to show the persistent use by the law-making body of the words "Any alien."

Since we are sure that these words in the earlier acts are limited to aliens of the white and black races, we are compelled to assume with equal certainty that the words are used throughout in the same sense. Congress cannot have deliberately enacted the statute of 1918 with the expectation that a new and special meaning should be accorded to these words.

All the Naturalization Acts show a studied intention on the part of Congress to limit the privilege to persons of the white and black races. (*Bessho vs. United States, supra.*)

If, therefore, appellant is a citizen, his right must be found elsewhere than in the statutes above quoted. That it is so found is the contention of appellant. He refers the court to two statutes, one of them found in the Act of 1918 and the other in the Act of July 19, 1919. The former reads as follows:

"Section 2. That all acts and parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section 2169, R. S., except as specified in the seventh subdivision of this act and under the limitation therein defined."

If Congress had stopped short with the first clause of section 2, no change in reality would have been effected thereby. Such repealing clauses, though very common in legislative acts, add very little to their meaning, since repugnancy itself operates a repeal of all prior acts to the extent of the repugnancy. In fact, some authorities incline to the view that the insertion of a general repealing clause to the extent of the repugnancy tends somewhat to limit the force of the repeal.

"There is a repeal to the extent of the repugnancy, in either case, but no further. The insertion, therefore, of such a general repealing clause adds nothing to the repealing effect of the act. But some cases hold that the insertion of such a clause has a restraining effect on the repealing force of the new statute, etc." (Lewis' Sutherland on Statutory Construction, vol. 1, sec. 256; *Bank of British North America vs. Kahn*, 79 Cal. 463.) We are not required, however, in the present case, to go to this extent.

But Congress saw fit to add a second clause to the repealing section. This second clause reads as follows:

"But nothing in this act shall repeal or in any way enlarge section 2169 of the Revised Statutes."

This second clause shows two things: First, that Congress did not

intend in any way to repeal or modify section 2169, and, secondly, that it had in mind the necessity of preserving the "white" limitations in the Naturalization Laws. It is altogether certain that neither the first clause nor this second clause makes any affirmative enlargement in favor of the yellow races. But Congress added a third clause, and it is this third clause which modifies the Naturalization Law, if any of them do. This third clause reads as follows:

"Except as specified in the seventh subdivision of this act and under the limitation therein defined."

But this third clause in no way modifies the meaning of said subdivision 7. It does not purport to do so. It no more than *saves* the modifications which in fact are specified in said subdivision. Section 2169 was neither enlarged nor repealed by the Act of 1918 except as it was enlarged or repealed by the force and effect of said subdivision 7, and it would have been equally enlarged or repealed if the added clause had been omitted. There is in said section 2 an implication that in some way said subdivision 7 enlarges or repeals section 2169. We find that it does in fact do so. Those provisions that relate to Filipinos and to some Porto Ricans, certainly extend the right to persons who are neither aliens nor white persons; hence if Congress chose to mention section 2169 at all, it became necessary to add the exception.

Had Congress intended to authorize the naturalization of the yellow, brown and red races, when it enacted said subdivision 7, it could have done so by the use of the words "Any alien of any color"; rather than a term which, by long usage, had come to mean only the white and black races. It would have been the employment of an unambiguous and certain method instead of an indirect and uncertain one.

Conceding that the Act of 1918 includes only the white and black races, it may be asked why it became necessary to enact it at all, since the white and black races were already provided for in the various other acts above mentioned. The full answer to this is that the Act of 1918 grants a number of important and additional rights, not granted in previous acts.

Having discussed the repealing section of the Act of 1918, our attention is turned to the Act of July 19, 1919, which act supplements the previous legislation on this matter. It reads as follows:

"Any person of foreign birth who, having served in the military or naval force of the United States during the present war after final examination and acceptance by the said military or naval authorities and shall have been honorably discharged after such acceptance and service, shall have the benefits of seventh subdivision of section four of the Act of June 29th, 1906, as amended, and shall not be required to pay any fee therefor, and this provision shall continue for the period of one year after all the American troops are returned to the United States."

This somewhat awkwardly worded act appears to extend the period of six months specified in said subdivision 7 to one year, to extend its provisions to aliens serving during the present war to one year after their discharge, and to dispense with the payment by them of any fee. It makes no other changes. Appellant, however, strenuously contends that the words "Any person of foreign birth" are not limited in their scope by section 2169, and that, as he is a person of foreign birth, he is entitled thereunder to the privileges of naturalization.

He claims, in effect, that the use by Congress of words unlike those used in all the previous enactments on this subject implies a legislative intent to accord to them a different meaning.

This contention is unsound. A person of foreign birth is necessarily an

alien, and an alien is necessarily a person of foreign birth. The expressions are synonymous. Quotations from dictionaries are not needed, though both the International and Standard define an alien as a person of foreign birth. We are not unmindful of the few apparent exceptions to this rule, such as the children of ambassadors, etc., but in all these cases the child is deemed, by construction, to have been born on the soil of the country of his race. By no interpretation, reasonable or unreasonable, can it be said that a person of foreign birth is any other than an alien. But apart from all this, if, in truth, an alien of the yellow race is not entitled to naturalization it is not because he is designated by the particular term "alien", but because of the force and effect of section 2169. This section as fully applies to persons of foreign birth as to aliens, should we for the moment admit any difference between them.

Congress, to express a difference, would not have used a perfect synonym. The inartistic phraseology of the act in other particulars suggests the source of the expression: "Any person of foreign birth." We are satisfied that the Act of 1919 does not aid the appellant.

Before leaving this branch of the matter to take up a consideration of decisions of federal courts, rendered within the past year, it is proper to observe that if, in fact, subdivision 7 grants a right to all aliens of every color it was wholly superfluous to declare that section 2169 was not repealed. If all aliens of all colors who served in the Army or Navy are entitled under subdivision 7 to naturalization, then section 2169 was repealed to that extent and, of course, no further, and it was meaningless surplusage to add that it was repealed no further.

On the other hand, if Congress had in mind the cases of Filipinos and certain Porto Ricans, and no others, as constituting the exceptions referred to in section 2 of the act, then we can understand why Congress, as a precaution, added an express statement that section 2169 is unrepealed, since it used language which, if unlimited, is broad enough to include aliens of yellow, brown and red races. The only construction that accords any purpose to Congress in adding these words "but nothing in this act shall repeal or in any way enlarge section 2169, R. S., except as specified in the seventh subdivision of this act and under the limitation therein defined," is the one which *saves* something as unrepealed which might otherwise be deemed repealed.

Beyond any possible question this something must be the yellow, brown and red races. It cannot be the Filipinos and Porto Ricans, since they are mentioned by name. The only others left to whom section 2169 might by possibility apply are the yellow, brown and red races.

We are referred to a number of decisions by federal courts wherein they have placed upon the acts under consideration a construction quite at variance with our own. We are not unmindful of the dignity and prerogatives of these courts and of the persuasive force of their conclusions. But in this matter of naturalization the laws place the state and federal courts on precisely the same plane, and the order or judgment of neither in matters of naturalization has greater force or effect than the other. We are referred especially to the case of Mon Foo Yan, decided on September 10, 1919, by the district court for the Northern District of California. However, this case is not and it does not purport to be an exhaustive examination of the question. The learned trial judge observes:

"The meaning of the amendment is not very clear, nor is it certain that the applicant's case is covered thereby, * * *. This much the court concedes to those who were willing to fight for this country during the late war."

Upon the point that the courts of the two sovereignties have equal jurisdiction we quote from *Grahl vs. United States*, 261 Fed. 487: "So far as Congress had the power, it placed the two kinds of courts (state and federal) upon an equality. By the terms of section 15 (in connection with other provisions of the Act of 1906) one federal court may review the grant of a citizenship certificate of another federal trial court or of a state trial court, and one state trial court may review the grant of another state trial court or of a federal trial court. No discrimination was made."

We are constrained, in view of the conclusion at which we have arrived, to hold that the petition of appellant was properly denied and, accordingly, the judgment of the lower court is affirmed.

PREWETT, P. J. *pro tem*.

I concur: HART, J.

CONCURRING OPINION.

I concur. Manifestly, the privilege of citizenship and of the exercise of suffrage in behalf of an alien is a matter entirely of statutory regulation. It is for the legislative department of the Government to determine what alien, if any, shall be admitted to this privilege, and upon what terms it may be acquired. As far as these questions are concerned, there is no intendment or presumption in favor of the foreign born. By reason of residence alone, or of his intention to make this country his home, or of any service he may have performed for this Government or our institutions, he may not claim this privilege. This question is not one of sentiment. No doubt every patriotic citizen must greatly admire the conduct of this applicant in voluntarily exposing himself to the hardships and dangers of war that our cause might be triumphant, and would be inclined to reward him for his sacrifice, but to show that he is entitled to this particular favor he must invoke some act of Congress that clearly authorizes the court to bestow it upon him. This he has failed to do. At most, his interpretation of the law is of doubtful propriety. Indeed, when we consider the various statutes together in the light of the familiar rules of interpretation and of the decisions of the courts, as pointed out in the main opinion, it seems fairly satisfying to hold that Congress did not intend to include him in the class of aliens entitled to citizenship.

BURNETT, J.

Filed February 26, 1921.

JOHN STAFFORD, Clerk.

2. PETITION FOR A HEARING BY THE SUPREME COURT, BY ALBERT H. ELLIOT.

To the Honorable Frank M. Angellotti, Chief Justice, and the Associate Justices of the Supreme Court of the State of California:

Comes now Albert H. Elliot, a practicing attorney of this court, and after leave first obtained, files this petition *amicus curiae* for an order that the above-entitled cause be heard and determined by this court, and represents as follows:

STATEMENT OF THE CASE.

Ichizo Sato, hereinafter called petitioner, on the 21st day of January, 1919, was admitted to citizenship by the United States district court of the Territory of Hawaii and a certificate of citizenship was regularly and duly issued to him. The certificate showed on its face that petitioner was a native of Japan; that in the year 1918 he enlisted in the regular military service of the United States Government, Company D, Second Hawaiian

Infantry; and that he was honorably discharged from the service on January 29, 1919. The certificate shows on its face that petitioner is of yellow color, dark complexion, brown eyes and black hair; that he was prior to naturalization a subject of Yoshihito, Emperor of Japan, and that the certificate was issued under the Act of May 9, 1918 (U. S. Comp. Statutes 1916, sec. 4352; 1918 Amd. Sup. Fed. Statutes, pp. 488, 496).

Petitioner presented his certificate of naturalization to respondent as county clerk of Sacramento County, and demanded that his name be placed on the great register as a citizen of the United States and of the State of California. Respondent refused to place petitioner's name on the great register. A writ of mandamus was sued out of the superior court of Sacramento County and in the hearing held thereon respondent was sustained. Appeal was taken from the judgment of said superior court to the district court of appeal (Third Appellate District), and on February 26, 1921, the judgment of the lower court was sustained, as appears from a copy of the opinion sustaining said judgment, which is hereto annexed and marked Exhibit "A". Petitioner now applies to the supreme court for an order transferring said cause to said court for hearing and final determination under article VI, section 4, of the constitution, and urges the same upon this court for the following reasons:

REASONS WHY THE APPLICATION SHOULD BE GRANTED.

1. The only question involved in the instant case is *the right of a Japanese who was honorably discharged from the military service of the United States Government, and to whom a certificate of naturalization was issued by a United States district court, to have his name placed upon the great register of Sacramento County as a citizen of the United States.*

2. The decision of the case necessarily involves the proper construction and interpretation of several federal statutes, and particularly the Act of May 9, 1918 (U. S. Comp. Stat., sec. 4352; Fed. Stat. Am. Sup. 1918, p. 488), and no state statute is in any way involved.

3. Since the question involved is solely one of naturalization, it necessarily follows that the decision in this case is of nation-wide importance, both as affecting the policy of the United States Government in granting, through the federal courts, certificates of naturalization to alien soldiers and sailors, and also affecting the substantial rights of many alien soldiers and sailors who already have certificates of naturalization and who are entirely ignorant of the effect of the decision upon their alleged vested rights.

4. Decisions of the district courts of the United States, both in San Francisco and Hawaii, upon applications for naturalization under the Act of May 9, 1918, are in direct conflict with the decision in the instant case, and in view of this conflict between federal and state courts, surely the situation at bar calls peculiarly for a hearing and determination by the highest court of this state.

5. Under article I, section 8, of the Constitution of the United States, Congress is given power "to establish an uniform rule of naturalization", and while states are given the right to grant or deny certificates of naturalization, the whole question of naturalization seems to be a federal one, and therefore the application of petitioner that the highest court of this state shall pass upon his status under a certificate of naturalization issued to him by a federal court should be granted as coming within the spirit and purpose of section IV of article VI of the constitution of California.

6. The instant case also decides that any certificate of naturalization

issued under the Act of May 9, 1918, is subject to collateral attack at any time by any state official. The legal effect, therefore, of the decision at bar is to nullify completely all certificates of naturalization issued to Japanese soldiers under the said act, and before such a serious assault upon the rights of many people not before the court is permitted, at least the decision which results in such an assault should, after review, receive the approval of the highest court of this state.

7. No case involving the question here involved has been decided, so far as we are advised, by either the highest state court of any state or the highest appellate federal court of any circuit of the United States, or by the Supreme Court of the United States. It is obvious that the question at issue will affect the naturalization policy of the United States Government in various parts of the United States and the territories. Therefore we urge that such an important question ought to be reviewed and determined finally by the Supreme Court.

8. The denial of the rights of citizenship to alien soldiers, irrespective of race or color, who enlisted in the service of our Government when we needed men in the late war, seems to be, on the face of things, such a serious breach of national good faith and so lacking in national gratitude that no state court decision should be allowed to produce such a result except there be an affirmance thereof after a careful review of the entire situation by the highest court of the state.

9. Finally, since naturalization has always been peculiarly a federal matter, and since the instant case presents a problem of naturalization, our request for a review of the decision is justified on the broad ground that there can never be a final and conclusive determination of the question until it shall have been settled by a decision of the Supreme Court of the United States, and should the instant case be taken into said court by appropriate proceedings, petitioner must have exhausted all his rights in the highest court of California.

THE ARGUMENT FOR THE APPLICATION.

The Act of May 9, 1918, under which the certificate of naturalization was issued to petitioner, is an amendment to the general Naturalization Act of June 29, 1906 (34 Stat. at Large, 596; U. S. Compiled Statutes of 1916, secs. 4351, 4383). The amendment consisted in "adding seven new subdivisions" (quoting from the enacting clause). Also in section 2 of the amending act many parts of the general Naturalization Act are repealed specifically, and then there follows this language:

"Sec. 4352 aa. (Act May 9, 1918, c. 69, sec. 2.) Acts repealed.

"All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined; provided, that for the purposes of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to this act the statutes and laws hereby repealed shall remain in full force and effect; provided further, that as to all aliens who, prior to January first, nineteen hundred, served in the Armies of the United States and were honorably discharged therefrom, section twenty-one hundred and sixty-six of the Revised Statutes of the United States shall be and remain in full force and effect, anything in this act to the contrary notwithstanding." (40 Stat. 547.)

Section seventh of the amendatory act, which is the particular act which

we are called upon to construe, is very long and not well arranged. We have therefore analyzed it and broken it up into the various classes of aliens to whom the act extends the rights of naturalization.

(a) *Native-born Filipino.*

1. He must be 21 years old and upward.
2. He must have declared his intention of being a citizen of United States.
3. He must have enlisted or hereafter enlist in Navy, or Marine Corps or Navy Auxiliary Force.
4. After three years' service have been honorably discharged or an ordinary discharge with recommendation for enlistment.

(b) *Any alien or Porto Rican (not a citizen of U. S.).*

1. Same as above.
2. Enlisted or hereafter enlist Armies of U. S., regular or volunteer or National Army, or National Guard, or Naval Militia of state or territory, or Navy or Marine or Coast Guard.
3. Or who has served 3 years on any vessel of U. S. A., 3 years on merchant or fishing vessel.
4. And while still in service or furlough—no proof of 5 years' residence.

(c) *Any alien.*

1. Serving military or naval service of U. S. during "present war."
2. No proof of intention.
3. No proof 5 years' residence.

(d) *Any alien.*

1. Serving U. S. Army or Navy or Philippine Constabulary.
2. And discharged honorably.
3. And accepted service on condition became a citizen.
4. Three years' residence.

(e) *Any alien.*

1. Owing permanent allegiance to U. S.
2. No proof of residence.
3. Certificate of service or honorable discharge, evidence of residence.

While the thirteenth subdivision of the amendatory act does not apply to the case of petitioner, we quote it as being clear evidence of the intent of Congress to extend to "any person" who had rendered service to the Government during the "existing war" the privilege of citizenship. The reason this section does not apply to petitioner is because petitioner was "honorably discharged" from the military service of the United States, but not "on account of disability incurred in line of duty". It would be interesting to know, in view of the use of the expression "any person", whether it would be argued that the legislative intent was to restrict the clear purpose of said section thirteenth to white persons or persons of African descent or nativity.

"Thirteenth. *Any person* who is serving in the military or naval forces of the United States at the termination of the existing war, and *any person* who before the termination of the existing war may have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, shall, if he applies to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he has resided continuously within the United States the time required by law of other aliens, or within the state, territory or the District of Columbia for the year immediately preceding the date of his petition for naturalization, but his petition for naturalization shall be supported by the

affidavits of two credible witnesses, citizens of the United States, identifying the petitioner as the person named in the certificate of honorable discharge, which said certificate may be accepted as evidence of good moral character required by law, and he shall comply with the other requirements of the naturalization laws." (34 Stat. 596, 36 Stat. 830, 40 Stat. 542-546, 548.) (*Italics ours.*)

It will now be necessary for us to make a critical and historical examination of the old statute known as R. S. 2169 (U. S. Compiled Statutes 1916, sec. 4358). It is as follows:

"Sec. 4358 (R. S., sec. 2169, as amended, Act Feb. 18, 1875, c. 80, sec. 1). Aliens of African nativity and descent.

"The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.

"Act July 14, 1870, c. 254, sec. 7, 16 Stat. 256. Act Feb. 18, 1875, c. 80, sec. 1, 18 Stat. 318."

THE HISTORY OF R. S. 2169 IN ITS RELATION TO THE UNIFORM NATURALIZATION LAW.

"The Constitution makes a grant of power to Congress to pass a uniform naturalization law. This power was first exercised by the act approved March 26, 1790 (1 Stat. 103). Section one of this act provided 'that any alien, being a free white person * * * may be admitted to become a citizen.' This act was repealed by the act approved January 29, 1795 (1 Stat. 414), which in turn, on the recommendation of Jefferson, was repealed by the Act of April 14, 1802. Both of these acts limited naturalization to aliens being free white persons. This rule obtained until 1870, when the law was amended to include aliens of African nativity and persons of African descent. In 1873 the revisers of the United States formulated the provision as follows: 'The provisions of this title shall apply to aliens of African nativity and to persons of African descent.' In 1875 this section was amended so as to include free white persons, and the law recognized by the courts as now in force is embodied in section 2169 of the Revised Statutes, reading as follows: 'The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent.' (5 Fed. Stat. Annot. 207.) There is also the Act of 1906 (1909 Supp. Fed. Stat. Annot. 364), providing a uniform rule for the naturalization of aliens throughout the United States, which is virtually ignored, as to this question, in the reports, and to which reference will be made again. Thus it will be seen that the expression 'free white persons' is found in all our Naturalization Acts from 1790 down to the adoption of the Revised Statutes, except from 1873 to 1875, when it was omitted. * * *

"The debates on the naturalization bill of 1790, so far as they are reported in the House Journal and the annals of Congress throw no light on the so-called ethnological problem involved. The discussions centered on the constitutional rights involved in citizenship such as the ownership of land and tenure of office. But one phase of the subject loomed large and that was the question of immigration. This was to be encouraged, and the problem was 'to so adjust the naturalization law as to reap the maximum advantage from immigration'. It will be well to carry this thought in mind. * * *

"May not something of the congressional intent be learned from subsequent Naturalization Acts? The Acts of 1795 and 1802. like the original act, limited the privilege to free white persons. In 1870 the law was amended so as to include aliens of African nationality and descent. This was the political answer to the Dred Scott case. But in 1873 the words

'free white persons' were omitted, only to be restored in the amendment of 1875. In the interim between 1873 and 1875 any alien was eligible to naturalization. (*In re Ah Chung*, 2 Fed. 733.) Now if in 1875 Congress intended to limit the privilege to Europeans and Africans, and to exclude Asiatics, why did it not insert a more definite expression than 'free white persons' in the statute of 1875? Consider in this connection section 14 of chapter 126 of the Act of May 6, 1882, whereby the ineligibility of Chinese was expressly provided for, as follows: 'That hereafter no state court or court of the United States shall admit Chinese to citizenship, and laws in conflict with this act are repealed'. If the words 'white persons' in the amendment of 1875 excluded Chinese, what was the reason for the Act of 1882? Is it not 'a logical conclusion that the words 'white persons' in the amendment of 1875 included all aliens not otherwise classified? And if this be stubbornly resisted—though on what grounds we cannot conjecture—may it not be fairly mooted whether section 2169 of the Revised Statutes was not modified by the Act of 1882? These are questions which as yet seem not to have been presented to the federal courts.

"Singularity, the Act of June 29, 1906, 34 Stat. L. 596, the latest expression of Congress on the subject (excepting the amendment of 1910 not pertinent to this discussion) has received scant attention from the courts on this question. That act provides a uniform rule for the naturalization of aliens throughout the United States. Section four provides that 'an alien may be admitted to become a citizen of the United States in the following manner and not otherwise'. Nothing is said here of an alien being a free 'white person'. What is the effect of this act on section 2169, which limits the application of the whole title to free white persons? Is not the latter section repugnant to or at least inconsistent with the Act of 1906?"

(We have quoted from Otto Erickson, writing in Law Notes, May, 1916.)

THE PROPER CONSTRUCTION OF THE AMENDATORY ACT OF MAY 9, 1918, AND ESPECIALLY SUBDIVISION SEVENTH THEREOF IN ITS RELATION TO R. S. 2169.

The questions which must be answered in this connection are:

(a) How far does the Act of May 9, 1918, amend or repeal or modify R. S. 2169?

(b) May not subdivision seventh of the Act of May 9, 1918, be so construed as to be in perfect harmony with R. S. 2169, so far as it clearly gives rights of naturalization to *those aliens only*, irrespective of face color, who, as soldiers and sailors, come under any one of the classifications which we have specified above?

It is perfectly clear that Congress *ex industria* evinces intent not to repeal 2169 R. S. except so far as it was necessary so to do, in the granting to alien soldiers and sailors the right to naturalization as provided by the said seventh subdivision. It is equally clear that Congress intended to modify the restrictions of 2169 R. S. so far as it was necessary in order to grant rights to these alien soldiers and sailors. It is also clear that Congress knew that the said subdivision seventh was a grant of naturalization to aliens who were not "free white persons" or aliens of "African nativity" or persons of "African descent". We must make this assumption or the language used becomes meaningless:

"But nothing in the act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of the act and under the limitations therein defined."

Granting, then, as a matter of statutory construction that Congress must have intended to grant naturalization to some alien soldiers and

sailors not white persons, let us inquire specifically who were these persons and let us look at our classification of aliens described above.

The first group eligible to citizenship is Filipino soldiers and sailors. Both Filipinos and Porto Ricans are neither citizens of the United States nor are they aliens (*In re Alverto*, 198 Fed. 688). They occupy a kind of twilight zone, between citizenship and alienship. The restrictions of 2169 R. S. have heretofore prevented them from being naturalized. It is obvious, therefore, that the use of the expression "any alien" in the seventh subdivision of the act, though they are words of generic character, would not have been sufficient to provide for the Filipino or Porto Rican soldier or sailor. It is equally obvious that Congress intended to except Filipino and Porto Rican soldiers and sailors from the restrictions of 2169 R. S.

But observe that there are at least five specific classes of persons described in the said subdivision seven of the act, while Filipino soldiers and sailors fill up only one of the classes, and Porto Ricans fill up half of another sharing the class with "any aliens" who fill up exclusively the three remaining classes. We may say parenthetically in this connection that Porto Ricans are coupled with any aliens in the second group because there has always been a doubt as to the political status of the Porto Rican.

When the force of this argument, as a matter of statutory construction based on the classes described in subdivision seventh, was first seen by the chief naturalization examiner of the district, the Honorable George A. Crutchfield, his answer, made in a written brief, was as follows:

"Moreover, it does not seem reasonable that in the first part of subdivision seven Congress should legislate for the naturalization of Filipinos under certain limited conditions and then immediately thereafter in all the other portions of said subdivision provide for the naturalization not only of Filipinos under the same conditions but under other and different conditions, and for the naturalization of other Asiatics under the conditions stated as well.

"If Filipinos can come in under the general term 'any alien' as used in the succeeding paragraphs of subdivision seven, what was the necessity or even sense of providing for their naturalization under the limited conditions set forth in the first paragraph of said subdivision?"

In other words, the argument was that Congress by the mention specifically of the Filipino and Porto Rican soldier and sailor evinces a clear intention *ex industria* to make these particular classes of aliens the only ones excepted from the restrictions of R. S. 2169. But since we have shown rather that Congress was compelled to mention specially Filipino and Porto Rican soldiers and sailors, because the expression "any alien" did not include them, we revert to our original question and ask how we can reason that two classes of soldiers and sailors whose faces are not white are not subject to the restrictions of 2169 R. S. while all the other three classes are so subject. Very industriously has Congress granted the right of naturalization to five classes of aliens who have performed military service for the Government when we needed the service. Very accurately does Congress say that 2169 R. S. shall be "repealed" or "enlarged" as specified in subdivision seventh and under the "limitation therein defined." What is this limitation? The answer is a simple and obvious one. *Only* the aliens shall be excepted from 2169 R. S. who have been soldiers or sailors in the service of the Government. This is a clear limitation five times repeated. The restrictions of 2169 R. S. shall not be removed from aliens not of the white race, subject to the limitation clearly set forth in subdivision seven, to wit: that they must be soldiers and

sailors who have served our Government honorably. This analysis supplies the "repeal or enlargement of the paragraph cited *supra* and also suggests the limitation therein referred to. In other words, the entire amendatory Act of May 9, 1918, can be construed together with 2169 R. S. if we understand that Congress intended to grant naturalization to those aliens not white persons, and also to those Filipinos and Porto Ricans (neither white persons nor aliens) who had rendered military services to the Government as specified in the seventh subdivision. Congress did not attempt to repeal or modify 2169 R. S., except as to aliens and Filipinos and Porto Ricans who were not white persons, but who nevertheless had performed honorable military services for the Government during the war. The amendatory act shows on its face that it is a war measure and there is not the slightest evidence of any attempt to open the doors to general naturalization of aliens generally ineligible under R. S. 2169. In view of the harmony which exists between the seventh subdivision of the amendatory act and 2169 R. S. if we adopt the construction herein contended for we fail to understand why we should struggle for a construction of the acts which deprive alien soldiers and sailors of rights which they have earned by military service rendered to the Government.

The opinion of the appellate court (Exhibit A) upon this point is as follows:

"'Except as specified in the seventh subdivision of this act and under the limitation therein defined.'

"But this third clause in no way modifies the meaning of said subdivision 7. It does not purport to do so. It no more than saves the modifications which in fact are specified in said subdivision. Section 2169 was neither enlarged nor repealed by the Act of 1918 except as it was enlarged or repealed by the force and effect of said subdivision 7, *and it would have been equally enlarged or repealed if the added clause had been omitted*. There is in said section 2 an implication that in some way said subdivision 7 enlarges or repeals section 2169. We find that it does in fact do so. Those provisions that relate to Filipinos and to some Porto Ricans certainly extend the right to persons who are neither aliens nor white persons; hence if Congress chose to mention section 2169 at all, it became necessary to add the exception." (Italics ours.)

We confess that we cannot follow the learned court below when it says: "But this third clause in no way modifies the meaning of said subdivision 7." The fact is that it is said subdivision seven which modifies the meaning of R. S. 2169. It is 2169 R. S. which is directly modified and limited by the seventh subdivision. Nor can we agree with the court that the quoted portion of section 2 is entirely unnecessary or that "it would have been equally enlarged or repealed if the added clause had been omitted". We believe that the learned court has erred as a matter of logic in dividing the said section 2 into two parts. If we read the said section together we can see a studied effort on the part of Congress to preserve 2169 R. S. intact except so far as it shall be modified to grant naturalization to alien soldiers and sailors. We have already shown why Filipino and Porto Rican soldiers and sailors are specifically mentioned and we must respectfully disagree with the appellate court's suggestion "if Congress chose to mention section 2169 at all". We contend strenuously that the mention of 2169 is industriously made for the specific purpose of clearness of construction to the effect that it should not be considered that 2169 R. S. was repealed except to the extent necessary to grant naturalization to the classes described in subdivision seven of the act.

The expression "any alien" used without qualifying words all through the Act of May 9, 1918, would never have been construed by any court or person whatever as being limited to an alien of the white race, were it not for the fact that certain decisions, which we shall now consider, have placed this construction upon the same words used in earlier acts.

We shall attempt to show: first, that all the decisions bearing upon this question are decisions of inferior courts; second, that the learned judges who wrote these decisions were misled by the codification and physical arrangement of the various acts; third, that these decisions should have no authoritative force in the interpretation of the statute of May 9, 1918.

In re Ah Yup, Federal Cases No. 104 (Circuit Court Cal., April 29, 1878):

This is the leading case holding that a Chinese was not entitled to naturalization under R. S. 2169.

It is interesting to note that in 1882 an act was passed (22 Stat. at Large 61; U. S. Compiled Stat. 1916, sec. 4359), which reads as follows:

"Hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed." (22 Stat. 61.)

As a matter of interpretation it is interesting to inquire why, in view of the above case, Congress considered it necessary to pass the above legislation aimed specifically at Chinese. It is further interesting to note that by the terms of the above act a Chinese alien might be excluded from naturalization under the Act of May 9, 1918, and the passage of the above act would seem to exclude all aliens, not specifically included therein—*expressio unius est exclusio alterius*.

In re Camille, 6 Fed. 256 (Circuit Ct. Oregon, Nov. 2, 1880):

This case was decided under 2167 R. S. since repealed and it was held that a person part Indian could not be naturalized. In the opinion the court says:

"the negroes of Africa were not likely to emigrate to this country, and therefore the provision concerning them was merely a harmless piece of legislative buncombe."

And further the court says:

"and in construing the acts of Congress upon the subject of naturalization the courts ought not to go beyond what is plainly written".

We call particular attention to the fact that 2167 R. S., which was repealed by the Act of June 29, 1906 (34 Stat. 603), was at the time this decision was rendered a part of title 30 which included 2169 R. S. When 2169 R. S. made "the provisions of this title" applicable only to the persons described in said section, obviously any decision construing an act which was a part of title 30 must necessarily use said 2169 R. S. as a rule of construction. We shall show later how other acts were construed following the rule of the above case, even though said acts were not a part of title 30, except so far as they have been made a part of title 30 not by Congress, but by the codifiers of the statute.

In re Saito, 62 Fed. 126 (Mass. Circuit Ct., June 27, 1894):

This is the first Japanese case decided and it was held under section 2169, R. S., that a Japanese was not entitled to naturalization.

In re Rodriguez, 81 Fed. 337 (D. C. Texas, May 3, 1897):

This was the case of a Mexican, who was granted naturalization notwithstanding 2169 R. S. and even in face of the fact that he was not a white person because, as the court says:

"he is embraced within the spirit and intent of our laws upon naturalization".

In re Buntaro Kumagai, 163 Fed. 922 (District Ct. St. Wash., Sept. 3, 1908):

This is a Japanese case and is much relied upon in the opinion of the appellate court. We shall therefore give it careful attention. The Japanese made application under section 2166, R. S. (U. S. Compiled Stats. of 1916, sec. 4355, 12 Stats. at Large 597), Act of July 17, 1862. This act was passed during the Civil War and, by a process which we are unable to discover, was codified under title 30 along with section 2169, R. S. The fact is that the Act of July 17, 1862, is entitled "An act to define the pay and emoluments of certain officers of the Army and for other purposes" (12 Stat. 597). The act contains twenty-two separate sections devoted to all sorts of purposes affecting officers of the Army and only one section, No. 21, is devoted to the question of naturalization and it reads as follows:

"Sec. 4355 (R. S. 2166). Aliens honorably discharged from military service.

"Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the Armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States." (Act July 16, 1862, c. 200, 21, 12 Stat. 597.)

The court, in deciding the above case, says that the above act "became incorporated in title 30 of the Revised Statutes of the United States as section 2166 (U. S. Comp. St. 1901, p. 1331)".

And later in the opinion the court says:

"As both sections are comprised in title 30, this amendment of section 2169 provides a rule of construction applicable to section 2166, and being the latest expression of the will of Congress on the subject, it is controlling, and limits the privilege of naturalization to white persons."

Thus we find that this leading case, decided under an act which by its terms makes no reference to title 30, and which, except in one section, is devoted to a subject matter other than naturalization, is cited as authority controlling in the construction of the phrase "any alien" as used in the Act of May 9, 1918. Once we concede that this one section of the Act of 1862 was properly placed in title 30 where it would be controlled specifically by 2169 R. S. we have allowed the codifiers, rather than the legislators, to express the legislative intent and to set up a standard of construction which is most unusual. We have searched diligently and have failed to find any indication in the Act of 1862 that Congress intended the act, or any part of it, to be incorporated in title 30 and to be affected by 2169 R. S. And yet we trust that we have shown conclusively that the learned judge who decided the above case placed his decision entirely on the ground that the Act of July 17, 1862, and section 21 thereof, especially, was a part of title 30.

In re Knight, 171 Fed. 299 (Dist. Ct. N. Y., July 13, 1909):

Citizenship was denied in this case to the applicant because his mother was half Chinese and half Japanese, although his father was English. It appeared that the applicant served at the Battle of Man'ila Bay on the flagship Olympia and had a medal for service. His application was made under the Act of July 26, 1894 (28 Stats. at Large 124, U. S. Compiled

Stats. of 1916, sec. 4356). This Act of July 26, 1894, is entitled "An act making appropriations for the Naval Service for the fiscal year ending June 30, 1895, and for other purposes." The act is very long, covers a multitude of subjects and only a portion of the first paragraph is devoted to naturalization, and reads as follows:

"Sec. 4356 (Act July 26, 1894, c. 165). Aliens honorably discharged from service in Navy or Marine Corps.

"Any alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien, shall in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States Navy or Marine Corps." (28 Stat. 124.)

Again we have examined the long act, of which the above is a small part, carefully, and fail to find in the act itself any legislative intent to make any part of the act a part of title 30 where it would be controlled in any way by 2169 R. S. So far as we can find this was the act of the codifier of the statutes, and yet the decision in the above case, following the Kumagai case, is based upon the fact that the Act of 1894 is a part of title 30 and therefore is controlled as a matter of statutory construction by 2169 R. S.

Bessho vs. United States, 178 Fed. 245 (Dist. Ct. Virginia, Feb. 1, 1910):

The application for naturalization in this case was made under the Act of July 26, 1894 (28 Stats. at large 123), which is the same act involved in the case of *In re Knight* (*supra*) and the comments which we made with respect to that case apply to the case under consideration. In the course of the opinion the court says:

"Title 30 of the Revised Statutes has incorporated therein all of the legislation relating to this subject, in force at the time of the revision of 1873 and of the amendments thereto of 1875. That title embraces section 2165 to 2174, inclusive, of said Revised Statutes (U. S. Comp. St. 1901, pp. 1329-1334). Of these sections is 2169, reading as follows:"

The court then proceeds to quote 2169 R. S., but observe that the basis of the court's decision is the fact that the Act of July 26, 1894, or at least a portion of it, bearing upon the subject of naturalization is inserted in title 30 by no act of Congress, but, so far as we can ascertain, arbitrarily by the codifiers of the statute.

It would be said, however, that the general Naturalization Act of June 29, 1906 (34 Stat. at Large 596, U. S. Comp. St. Sup. 1909, p. 97), was cited in the above case and particular attention was called to the fact that while many of the sections compiled in title 30 were specifically repealed, 2169 R. S. was not so repealed.

It will be observed from a reading of the opinion of the appellate court, Exhibit "A", that the above case is cited with approval and evidently is considered a leading case so far as judicial interpretation of the words "any alien" is concerned. In fact the entire argument of the appellate court, Exhibit "A", rests upon the assumption that since the above case and the other cases cited have interpreted the expression "any alien" as meaning any alien being a white person, the same expression "any alien" when used in the Act of May 9, 1918, must receive the same interpretation.

We have shown, however, conclusively that the above case and the other cases herein cited all seem to be controlled by the fact that there was comprehended within title 30 the various parts of acts under which the applications were made for naturalization in the respective cases.

In re Alverto, 198 Fed. 688 (Dist. Ct. Penn. Sept. 24, 1912):

The applicant in this case was a native of the Philippine Islands and he applied for naturalization under the Act of July 26, 1894, which is the same act to which we have already given consideration. It was held in this case that the petitioner under the Act of July 1, 1902, providing for the administration of the Philippine Islands, is not an alien. The case also holds that section 2169, R. S., limits the whole body of naturalization laws and that the applicant was not entitled to naturalization, although it was conceded that another provision of the Act of June 29, 1906 (of which section 30 is a part; U. S. Comp. St. 1916, sec. 4366), included Filipinos and Porto Ricans.

SUMMARY OF THE ARGUMENT AGAINST PETITIONER BASED ON ADJUDICATED CASES.

Succinctly stated, the argument of the appellate court, Exhibit "A", is as follows: The expression "any alien" used repeatedly by Congress in the Act of May 9, 1918, has been construed in the decisions above referred to as meaning "any alien being a free white person."

All of the above cases decided by lower courts and each of the later cases followed, as we have shown, the precedent of the earlier case. Our answer to this argument is twofold:

FIRST.

The cases were decided on the basis of an arbitrary codification and arrangement of the particular acts involved without the slightest legislative justification for the codification and arrangement.

In the preface of the Annotated Edition of the U. S. Compiled Statutes of 1916, John A. Mallory, the editor, uses the following language:

"The revision of 1878 was the last revision authorized or approved by Congress. The basis of the annotated edition is the compilation of 1913 with the addition of the legislation passed by Congress up to the close of the first session of the 64th Congress. After the death of Mr. Mallory, the work was continued by trained editors familiar with Mr. Mallory's methods and who had become imbued with his traits of thoroughness and precision.

"The Congress of the United States is not subject to constitutional restrictions with respect to the form of its enactments. It is not required to confine its measures to a single subject, or to express the subject of legislation in a comprehensive title. It is not circumscribed by any rule in respect to the amendment of the statutes. This being true, every bill passed by Congress must be carefully examined by the compiling editors to ascertain whether it contains matter appropriate for the compilation. Matters of general legislation of a permanent nature are interspersed through appropriation acts by way of proviso and otherwise. These provisions must be carefully culled from the mass of appropriation acts and classified to their appropriate divisions of the statutes. This work has been done with thoroughness and painstaking care and all laws of Congress of a general and permanent nature appear in the compilation, and can be found by reference to the index or the tables of statutes.

"The arrangement of the laws as originally presented in the official Revised Statutes of the United States of 1874 and 1878, and which has become familiar to the bench and bar and the departments of the Government, has

been preserved in the new compilation. This arrangement is an excellent and easily workable one, and there seems to be no occasion or necessity for the adoption of a different plan of division. * * *

We have shown that in each of the above cases an act or a portion of an act was involved, which was enacted by Congress long after the authorized revision of 1878, and in no one of these acts or portions of acts, so far as we have been able to discover, has Congress authorized the codification under title 30. And yet the quotations from the opinions, in most of these cases, show that the court considered itself controlled as a matter of interpretation by the fact that the act or portions of act was coupled up with 2169 R. S. in title 30. The Act of July 17, 1862 (12 Stat. 597), forms the one exception, as this act must of course have been in existence at the time of the revision of 1878. And the decision rendered under this act has formed the precedent for all the other decisions upon the theory that all the other acts and parts of acts, like the Act of July 17, 1862, formed a part of title 30.

SECOND.

Even if we concede that the expression "any alien" had, at the time it was used in the Act of May 9, 1918, received a fixed judicial interpretation which must have been known to Congress, nevertheless our contention is that in the Act of May 9, 1918, Congress has industriously made it clear that, so far as soldiers and sailors are concerned, the expression "any alien" was intended to mean exactly what the words say.

Aside from the obvious injustice involved in reading into words of simple meaning qualifications thereof never intended, we appeal to this court to resist the attempt by judicial interpretation to make words mean something different from that which the layman who gave his services to the country would understand them to mean. We have shown that in the Act of May 9, 1918, the expression "any alien" is used to define at least four separate classes of soldiers and sailors. We have also shown that in section 13 of the act other words are added and the particular soldier or sailor defined in said section 13 is described as "any person". The use of this expression "any person" shows a clear congressional intent to permit naturalization to a soldier or sailor, wounded or sick in the line of duty and honorably discharged, whatever might have been the color of his face. The entire Act of May 9, 1918, shows from its reading that Congress intended to recognize military services rendered by soldiers and sailors, at least to the extent of granting them naturalization. Congress believed undoubtedly that a person competent to wear our uniform and to fight our battles under our flag should be qualified for naturalization and citizenship. This is the spirit of the entire Act of May 9, 1918, and if we rob the act of its generous purpose, by judicial construction, we not only introduce ingratitude where there is none, but we say in effect to all soldiers and sailors who served us, "Though Congress passed an act broad enough to include you, now that the war is over we will exclude you by judicial interpretation."

Another proof of legislative intent is found in an act passed July 19, 1919 (Fed. Stat. Annotated 1919, Sup. 274; 41 Stat. at Large, 222). This act reads as follows:

"Any person of foreign birth who served in the military or naval force of the United States during the present war after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of seventh subdivision of section four of the Act of June 29, 1906, 34 Statutes at Large, part one, page 596, as amended, and shall not be required to pay any fee therefor, and this provision shall continue for the period of one

year after all of the American troops are returned to the United States."

If the passage of the above act, which is, so far as we are advised, the latest legislative expression on this subject matter, does not evince, *ex industria*, a congressional intent to include all aliens, soldiers and sailors who complied with the terms of the statute, then we are at a loss to know how Congress could have expressed itself in accordance with the aims and objects sought. Instead of any studied attempt to limit the expression "any alien" as it could have been easily done by adding the qualifying phrase "being a free white person", we have shown how Congress first broadens the expression to "any person" in the 13th subdivision of the act and then further broadens the expression in the Act of 1919, to "any person of foreign birth."

Another very significant use of words by Congress is found in the Act of June 30, 1914 (United States Compiled Statutes of 1916, sec. 4356-A). This section reads in part as follows (*italics ours*):

"Any alien of the age of twenty-one years and upward who may, *under existing law, become a citizen of the United States, who has served or may hereafter serve for one enlistment of not less than four years* * * *."

This act was a provision of the Naval Appropriation Act for the year of 1915. Obviously Congress, in this act, intended to limit the privileges thereof to persons who might, "under existing law", become citizens of the United States. We quote this act to show how very easy it was for Congress to limit naturalization to aliens qualified under section 2169, R. S., by the use of the simple bit of phraseology "under existing law".

In view of this obvious congressional intent, as expressed in the act passed June 30, 1914, may it not be argued with considerable power that the omission of any such phraseology from the Act of May 9, 1918, is clearly the expression of a legislative intent not to limit naturalization to aliens qualified "under existing law".

In the opinion of the appellate court, Exhibit "A", a reply is made to this argument by the suggestion

"a person of foreign birth is necessarily an alien, and an alien is necessarily a person of foreign birth. The expressions are synonymous. * * *"

"Congress, to express a difference, would not have used a perfect synonym. The inartistic phraseology of the act in other particulars suggests the source of the expression: 'Any person of foreign birth.' We are satisfied that the Act of 1919 does not aid the appellant."

Is it not obvious that the appellate court is not only compelled to argue that the expressions "any alien" and "any person of foreign birth" are synonymous, but the said court is also forced to argue that since "any alien" must be judicially interpreted as meaning "any alien being a free white person", so also must we interpret the expression "a person of foreign birth" as meaning a person of foreign birth, being a free white person. This method of argument may be sound, but if it is then we should be interested to know what language Congress could adopt to carry out the intent of the act with any assurance that judicial interpretation would not add something or other to the language. We are not surprised that the learned appellate court comments on the "inartistic phraseology of the act". We ask if the phraseology would be more artistic if Congress every time that it used the expressions "any alien", "any person", or "any person of foreign birth," added thereto the phrase "being a free white person". And yet the argument of the learned appellate court not only suggests this sort of phraseology as being artistic but running all through the argument is the necessary suggestion that Congress could have made the matter entirely clear and also artistic by adopting the suggested phraseology if Congress

had ever intended to exclude from naturalization alien soldiers and sailors whose faces did not happen to be white.

It seems to us to stretch imagination to the breaking point when we are asked to read into the statute of May 9, 1918, words which it does not contain directly or indirectly and then complain because Congress was inartistic in that it failed specifically to add the words which we are attempting to read in, despite the fact that they are not there. If Congress ever had in mind the decisions of the lower courts, to which we have called attention, then we can find in the Act of May 9, 1918, a studied attempt, so far as the use of language is concerned, to make it certain that the said decisions should not control. We repeat that the use of four words, to-wit, "being free white persons", would have made the act artistic and clear, if Congress had ever intended to exclude from naturalization alien soldiers and sailors who were not free white persons.

CASES DECIDED UNDER THE ACT OF MAY 9, 1918.

The cases decided directly under the Act of May 9, 1918, have not, so far as we are advised, reached the Law Reports, and we are compelled to advise the court, regarding these cases from the best information which we have at hand. We have applied to the naturalization bureau at Washington with the request that the bureau furnish us with all cases decided throughout the United States on either side of this question, and if the instant case is heard in the Supreme Court and we secure this information from the bureau of naturalization we shall give it to the court. We applied to the chief naturalization examiner, Hon. George A. Crutchfield, in San Francisco, but he was unable to furnish us with memoranda of the cases decided. So far as we have been able to discover, the following cases have been decided directly under the act:

In the Matter of Mon Foo Yan, No. 3747 (U. S. Dist. Court Northern Dist. of Cal., First Division):

The applicant in this case was a young Chinese who entered the Army during the war with Germany and served 18 months, a portion of which time was spent in active campaigning in the Argonne and in Belgium. His captain recommended him most highly for honesty and mental capacity. The Hon. M. T. Dooling, judge of the district court, in granting the application, says:

"But as the language is broad enough to cover such a case, and as I believe that any doubt as to the meaning of the law should be resolved in favor of those whom the Government thought fit to take into active military or naval service during the late war, the practice of this court, until the questions involved have been passed upon by the supreme court, or by the court of appeals for this circuit, will be as follows:

"In the case of those serving in the military or naval service of the United States during the time this country was engaged in the war with Germany, the applicant will be admitted by this court, leaving the burden of reviewing such action upon the Government."

In re Frank Sasaki (same court as above and same judge):

The applicant in this case enlisted in the 16th Field Artillery during the war and saw service in France. He was a Japanese. His application is made under the Act of May 9, 1918. In granting him naturalization Judge Dooling said:

"This man gave his services to this country when we needed soldiers, so let us settle the question for all time and allow him to take his oath."

District court of the United States for Hawaii:

We quote from the Recorder of December 20, 1918, and regret that we are unable to furnish this court with the opinion in this case:

"Honolulu, Dec. 19.—Alien Japanese, Chinese and Koreans, serving in the United States Army or Navy, are eligible to become citizens of the United States and will be admitted by Federal Judge Horace W. Vaughan upon proper application under the provisions of an amendment to the naturalization laws passed by Congress on May 9, 1918.

"Judge Vaughan has rendered this opinion as a refutation to the prevailing opinion that Orientals are excluded from naturalization by section 2169 of the Revised Statutes, which limits naturalization rights to persons of the Caucasian and negro races. Judge Vaughan holds that the act of May repeals the former section, which was first passed in 1802 and amended to permit the naturalization of negroes in 1875."

In speaking of the Act of May 9, Judge Vaughan said:

"Section 2169 of the Revised Statutes prohibits the naturalization of any except white persons and persons of African descent. This act has been held by the courts to forbid the naturalization of Japanese, Chinese, Koreans or Malays.

"This Act of May 9, 1918, is an amendment to naturalization laws and repeals section 2169. The repealing clause reads as follows:

"That all acts, or parts of acts inconsistent or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section 2169, revised statutes, except as specified in the seventh subdivision of this act, and under the limitations therein defined."

"The seventh subdivision authorized the naturalization of 'any alien' who is in the service of the United States Army or Navy during the period of the present war."

It is evident from the seventh subdivision that Congress did not intend to exclude any race from naturalization when it passed the law, otherwise, it is held by Judge Vaughan, a clause would have been inserted dealing separately with those that exclusion was intended for. The words "any alien" are taken literally by the judge.

In speaking of his contention, he said:

"By reverse construction, it is evident Congress intended that section 2169 should yield to the seventh subdivision referred to, and in case of conflict between any of the provisions of the seventh subdivision and section 2169, the latter must give way."

A CERTIFICATE OF NATURALIZATION REGULARLY AND DULY ISSUED IS A JUDGMENT OF A COURT OF RECORD AND IT IS NOT SUBJECT TO COLLATERAL ATTACK.

We shall now raise a very serious question and shall try to show that the county clerk of Sacramento County, in refusing to register petitioner on the presentation of his certificate of naturalization, regularly issued by the district court of the Territory of Hawaii, made in effect a collateral attack upon the certificate.

"An order admitting an alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction. It is an adjudication on personal status, and is in the nature of a judgment *in rem*." (2 Corpus Juris, sec. 149, p. 1123.)

"An order admitting to citizenship, having the force and effect of a judgment, is conclusive as to all matters necessarily before the court and involved in the issue. It is not open to collateral attack even upon allegations charging fraud in its procurement, unless the judgment is void, as for want of jurisdiction; and it can be annulled or set aside only in some recognized lawful mode." (2 Corpus Juris, sec. 150, p. 1124.)

"* * * When a certificate is issued as the result of a judicial hearing in a good faith attempt to exercise the jurisdiction conferred by the act of Congress, it is not open to attack in another court of co-ordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can properly be reached only by appeal or writ of error." (2 Corpus Juris, sec. 155, p. 1126.)

Scott vs. Strobach, 49 Alabama 477:

"A judgment admitting an alien to citizenship has none of the properties or qualities of a judicial proceeding *in personam*. It is rather *in rem*. It simply ascertains and defines the status of the individual, and of itself and in itself works no public or private injury. It is designed to be the indisputable muniment of the title to citizenship. The alien must, and it is intended he should, confidently rely on its inviolability. If, whenever his right or duty as a citizen is involved in any of the courts of the United States, or of the several states, the judgment of naturalization can be assailed, and he be put on proof of all the facts proved, or which were involved when the judgment was rendered, its value and dignity is (are) lessened; and that which our constitutions and laws teach him to regard as inestimable, would degenerate into a fruitful source of vexation and litigation."

With great pleasure, we cite an opinion of Chief Justice Marshall in the case of *Sprat vs. Sprat*, 4 Pet. 393, 408:

"The various acts upon the subject submit the decision on the right of aliens to admission as citizens to courts of record. They are to receive testimony, to compare it with the law, and to judge on both law and fact. This judgment is entered on record as the judgment of the court. It seems to us, if it be in legal form, to close all inquiry; and, like every other judgment, to be complete evidence of its own validity."

Tinn vs. U. S. District Attorney (148 Cal. 774):

We quote from the opinion as follows:

"The contention of the petitioner is that an order admitting an alien to citizenship, made by a court of competent jurisdiction, is a judgment of a court having jurisdiction of the subject matter and the person; that after the lapse of six months from the time such order is made it is too late to institute proceedings by motion to vacate the same; that when such proceedings are instituted after such lapse of time the court is without jurisdiction to act therein; and that the only proceeding which can be thereafter taken to vacate such order is an action in equity to set aside, on the ground that it is procured by fraud or mistake. We think this contention is correct. It is settled by the authorities that an order admitting any alien to citizenship is a judgment of the same dignity as any other judgment of a court having jurisdiction."

Johannson vs. U. S., 225 U. S. 227 (Cal., May 27, 1912):

The General Naturalization Law of June 29, 1906, and section 15 thereof for the first time provided a method by which the Government of the United States could bring a direct proceeding to set aside a certificate of naturalization. This case, as well as the case of *Grahl vs. U. S.* (*infra*), present the situation therefore of a direct attack under a special statute upon a certificate. Yet in the *Johannson* case, the court says:

"That the judgment of such a court (of record) upon the question was, like every other judgment, complete evidence of its own validity * * *. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack."

Grahl vs. U. S., 261 Fed. 487 (Dt. Ct. Wisconsin, Oct. 7, 1919):

This case presents another situation where the United States is making a direct attack upon a certificate of naturalization under the General Naturalization Law. The court says, however, in its opinion:

"A court that has jurisdiction of a stated subject matter and has the necessary parties before it is empowered to act honestly upon a mistaken view of the law, as fully as upon a correct view; and its judgment, though based upon errors of law, is impervious to collateral attack in other courts or in the same court, but not to direct attack. * * * But none the less it (sec. 4374) is plainly a direct attack."

Crane vs. Cummings, 137 Cal. 202:

"If the judgment was rendered thereon in disregard either of the law or of the facts applicable thereto, it could have been reviewed upon an appeal therefrom, but if no appeal was taken the judgment was conclusive on the defendant."

Syllabus—A judgment of naturalization obtained in the circuit court of Porto Rico, under R. S., section 2165, which has since been repealed by Act of June 29, 1906 (34 Statute 596), cannot properly, at this time, be questioned on the ground that the court did not have jurisdiction over the naturalization of aliens. (1912, 29 Op. Atty. General 521.)

CASES CONTRA EXPLAINED.

In re Gee Hop, 71 Fed. 274 (D. C. Cal. Dec. 27, 1895):

This was the case of a Chinese, who secured a certificate of naturalization, May 8, 1890, from a New Jersey court of record. At that time the Act of May 6, 1882 (U. S. Comp. Stat. 1916, sec. 4359), was in existence, and read as follows:

"Hereafter no state court or court of the United States shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed (22 Stat. 61)."

In the face of this statute Judge Morrow held that the certificate of naturalization was void upon its face, when the Chinese was seeking to land in the United States as a citizen. The court says:

"Its proceedings and judgment declaring him a citizen of the United States are absolutely null and void for want of jurisdiction, and cannot be recognized in this or any other court."

The court also said, however:

"The matter of naturalization is exclusively within the control of the Government of the United States, and not of the state."

In re Yamashita, 70 Pac. 482 (Sup. Ct. Wash. Oct. 22, 1902):

In this case the applicant, a Japanese, was applying for admission to practice law in the State of Washington. He presented a certificate of naturalization, issued May 14, 1902, by another superior court of the same state. His application to practice was denied on the sole ground that he was not a citizen of the United States. There is no question but that the judgment was a collateral attack upon a certificate of naturalization, issued by a state court. This is the only Japanese case of this character which we have been able to find and we cannot believe that it is sound, so far as it permits a collateral attack to be made upon a certificate of naturalization.

Van Fleet in his book entitled "Collateral Attack," section 16, sets forth the test as to whether a judgment is void collaterally as follows:

"In order to make a judgment void collaterally: either (1) a legal organization of the tribunal; or (2) jurisdiction over the subject matter; or (3) jurisdiction over the person must be wanting; or (4) one or more of these matters must have been lost after it once existed."

THE ARGUMENT OF THE APPELLATE COURT IN ITS OPINION EXHIBIT "A" JUSTIFYING THE ADMITTED COLLATERAL ATTACK UPON THE CERTIFICATE OF NATURALIZATION IN THE INSTANT CASE.

We have been unable to find any case where any state court has declared void any certificate of naturalization issued by any federal court. As we have clearly shown, the Yamashita case, *supra*, and the Gee Hop case, *supra*, are the only cases at all where collateral attack upon certificates of naturalization were allowed. In each case the certificate of naturalization was issued by a state court. We do not challenge the jurisdiction of a state court to issue certificates of naturalization under the powers vested in the state courts by the Act of June 29, 1906 (34 Stat. 596), but we strenuously insist that a broad distinction must be drawn between the right to issue a certificate of naturalization and the right to annul a certificate issued by a federal court in a collateral proceeding. Were it necessary to the decision of the instant case we might argue that the only jurisdiction in naturalization cases given by Congress to state courts is the "exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts * * *; also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited." (34 Stat. 596.)

In the case of *Grahl vs. U. S.* (cited *supra*) and relied upon in the lower court, on page 490 of the opinion the theory is set forth that the states in naturalizing matters are really acting under a sort of power of attorney, granted by the Government of the United States. Grave doubt is suggested by the decision in this case as to whether, after all, the jurisdiction of states, in naturalization matters, is not strictly limited to a sort of administrative function. As we have shown in that case a direct attack was made by the Government of the United States on a certificate of naturalization which had been granted by the district court of Wisconsin, and this attack was, as we have shown, specifically provided for by section 15 thereof (34 Stat. 601). We repeat that while in the instant case the burden is not placed upon our shoulders of contending that in no case may a state court annul a certificate of naturalization issued by a federal court, we submit, however, that there is grave doubt on that question, or as Judge Morrow says in the Gee Hop case (*supra*):

"The matter of naturalization is exclusively within the control of the Government of the United States, and not of the states."

Peterson vs. State (Tex. 1905), 89 S. W. 81:

"* * * state courts in enforcing such laws (naturalization) being mere federal agents."

Mackenzie vs. Hare, 165 Cal. 779:

"The status of persons as citizens or aliens, respectively, is controlled entirely by the Constitution of the United States and the acts of Congress passed in pursuance thereof. We must look solely to them to ascertain whether or not the plaintiff is a citizen and as such a voter entitled to registration. And in determining their meaning and effect the state courts are bound by the interpretation put upon them by the courts of the United States."

Syllabus—A state court in naturalization proceedings exercises a federal authority, and acts as a federal agent. (*People vs. Sweetman*, 3 Park. Grm. [N. Y.] 374; *Peterson vs. State*, 40 Tex. Civ. App. 175, 89 S. W. 81. See also *In re Christern*, 43 Super. Ct. [N. Y.] 523; *Eldredge vs. Salt Lake County*,

37 Utah 188, 106 Pac. 939.) It is *pro hac vice* a tribunal of the United States. (*People vs. Sweetman*, 3 Park. Crim. [N. Y.] 358; *U. S. vs. Breen*, 135 App. Div. 824, 120 N. Y. S. 304; *In re Christern*, 43 Super. Ct. [N. Y.] 523. See, also, *U. S. vs. Aakervik*, 180 Fed. 137.)

The argument of the appellate court, Exhibit "A", succinctly stated, is this: The certificate of naturalization in the instant case shows upon its face that petitioner is a member of the yellow race. Since 2169 R. S. prevents naturalization of any alien, not a free white person, the certificate as a judgment shows on its face that the federal court issuing the certificate was without jurisdiction. As the court says, a judgment which shows upon its face that the court rendering it is without jurisdiction of either the parties or the subject matter is void and subject to collateral attack, "is too well established to require any citation of authorities in its support".

But it is equally well established (a) that the decision of a court on the question of its own jurisdiction is immune from collateral attack, and also (b) that an error of law made by a court in deciding the question of its own jurisdiction is not subject to collateral attack. The certificate of naturalization in the instant case, in addition to showing on its face that the petitioner was a Japanese, also shows that he enlisted in the regular military service of the Government and was honorably discharged from said service on the 29th day of January, 1919, and received a discharge in writing. In issuing the certificate of naturalization the district court of Hawaii must have necessarily found in favor of petitioner to the effect that he was entitled to a certificate of naturalization, under the Act of May 9, 1918, notwithstanding he was an alien (not a free white person). In other words, the district court interpreted the Act of May 9, 1918, and especially subdivision 7 thereof, as amending 2169 R. S. to the extent of permitting the naturalization of Japanese soldiers and sailors who had served in our Army or Navy and who had received honorable discharge therefrom. In making this decision the district court may have erred in its interpretation of the Act of May 9, 1918. If so, the court committed an error of law and the Government of the United States on appeal from the order granting naturalization might have raised the question as to whether or not the district court had committed an error of law. No such appeal was taken. No direct attack is made upon the certificate of naturalization under the provision of section 15 of the Act of June 29, 1906, an act which specifically provides a method by which a certificate of naturalization may be set aside by the Government of the United States because of any illegality in its issue. The jurisdiction granted to United States district attorneys to cancel certificates of naturalization, in a direct proceeding under the above act is found in the provisions of the act itself "for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was *illegally* procured". (*Italics ours.*) (34 Stat. 301.) In the case of *Grahl vs. United States*, cited *supra*, it was specifically held that the word "illegally" as used in this statute meant contrary to law and that again meant contrary to the correct interpretation of the particular section 2171, R. S., which was involved in that case.

We therefore conclude that the district court of Hawaii in the instant case may have erred in interpreting the Act of May 9, 1918, as applicable to petitioner's situation, but surely such an error, even though it appears upon the face of the judgment, does not justify a collateral attack upon the judgment itself, or upon the certificate of naturalization. If the collateral attack in the instant case can be sustained, then never would the

holder of a certificate of naturalization be free from the vexation and litigation incident to constant attacks by courts and state and national officials upon his status.

As is well said in *Scott vs. Strobach*, quoted *supra*:

"If, whenever his right or duty as a citizen is involved in any of the courts of the United States, or of the several states, the judgment of naturalization can be assailed, and he be put on proof of all the facts proved, or which were involved when the judgment was rendered, its value and dignity is (are) lessened; and that which our constitutions and laws teach him to regard as inestimable, would degenerate into a fruitful source of vexation and litigation."

Murray vs. American Surety Co., 80 Fed. 341 (C. C. of App., 9th Circuit, Oct. 8, 1895):

"Whatever steps are provided for by statute may be taken by the court, and, no matter how irregular or erroneous its action may be in regard thereto, it is conclusive until reversed on appeal, and cannot be collaterally assailed."

Dowell vs. Appelgate, 152 U. S. 327:

"Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court."

Syllabus—A judgment obtained under a statute which is afterward declared unconstitutional is valid until reversed and cannot be impeached collaterally. (*Buckmaster vs. Carlin*, 4 Ill. 104; *Cassel vs. Scott*, 17 Ind. 514.)

Syllabus—Although a judgment was obtained under a law which had been virtually repealed by a treaty, declaring that no further proceedings should be taken under such law, still it cannot be avoided in a trial of title to lands claimed under such judgment. (*McNeil vs. Bright*, 4 Mass. 282.)

We conclude therefore on this branch of the argument that if each court before which application for naturalization may come shall issue a certificate of naturalization in the nature of a judgment to be later overturned or annulled by any other court which differs in opinion as to the interpretation of a statute, then all security for a judgment of this character is scattered to the four winds of judicial interpretation. We have been schooled to believe in the principle that the finality of judgments is the principal bulwark of the liberties of the people. Of course a judgment, which upon its face shows that the court rendering the judgment obviously had no jurisdiction of either the parties or the subject matter, would be no judgment at all. But where it appears upon the face of the judgment that it can be sustained upon a possible interpretation of the law such a judgment should be free from collateral attack even though a hundred other courts, state or federal, might be found to disagree in the interpretation of the law with the particular court which rendered the judgment. Unless we concede this principle as operative in the instant case, then all security against constant litigation is gone. Especially in the instant case should the holder of the certificate of naturalization have the benefit of the verity usually accorded a judgment, because the Act of June 29, 1906, gives to the United States an opportunity on direct attack to set the certificate aside. It would therefore seem that until such action is brought the holder of the certificate of naturalization should be secure against the whim or opinion

political or otherwise, of any state official who may assume to disagree with a court on the interpretation of a statute.

CONCLUSION.

We have tried to advise the court fully with respect to the condition of the law applicable to the application of petitioner in the case at bar. We have refrained in this application from discussing two debatable questions which we hope to take up with the court later if this application is granted and the case reheard before this court. These two serious questions are: First, does the expression "free white persons" as used in 2169 R. S. furnish any scientific basis of race classification which can guide a court in refusing or granting naturalization? Second, was not the General Naturalization Act of June 29, 1906, intended to present a complete scheme of naturalization, which should do away forever with the confusion previously existing in the minds of courts as to who are and who are not entitled to naturalization? Obviously the discussion of these two important questions might aid us in interpreting the Act of May 9, 1918, if there is any further doubt upon the subject, but the length of his argument has forced us to omit much which might be said on this branch of the case.

Are we asking much when we petition this court to construe liberally a statute passed by Congress during the exigency of a great war, and at a time when the Government needed soldiers and sailors for the defense of our country? Many aliens came voluntarily to our colors and enlisted without a selfish thought for the "great adventure". Some of them actually reached the fighting front and exposed their lives in our defense. They wore our uniforms, carried our arms, manned our ships and fought under our flag. We accepted them as soldiers and sailors and used them while the danger hovered over us like a black cloud. In a commendable spirit of gratitude and while the guns were still booming on the French front, Congress passed an act which both in language and spirit held out to these aliens a kind of reward for their services to us—this inestimable privilege which we call American citizenship. If allegiance be the essence of citizenship then these men regardless of race or color, gave proof of allegiance to our Government than which there could be no higher. If they were good enough to fly to our defense in time of trouble, and to wear our uniform and to carry our arms, then they were good enough for us to extend to them the right hand of American citizenship. So Congress thought when the Act of May 9, 1918, was passed. Any alien, soldier or sailor, reading that act would believe that the language was plain and that his reward for faithful service and honorable discharge was not a mere pittance of pay, but the great reward of citizenship in the Republic he had helped preserve. To take that reward from him after the service is rendered by any narrow meaning of words or by any forced interpolation of words which the statute does not contain is to break faith with those who are helpless to protect themselves. If this be argument from sentiment, then we plead guilty to the possession of a sentiment which urges us to demand of governments the same simple good faith which man must preserve with man in the everyday affairs of life. We shall not lightly convict Congress of using words with a concealed meaning or of keeping "the word of promise to our ear, and break it to our hope" (Macbeth).

One more suggestion and we are through. We are wondering, with all due and proper respect for the learned judges who have decided this case, whether any of us is able to put entirely out of his mind the race prejudice which so surcharges the air of California at the present time. Can

we conceive of ourselves struggling against a narrow and illiberal judicial construction of an act passed during a war period, for the protection or reward of our soldiers of our own race and color? Would it be necessary to struggle so hard against reading into a statute passed for the benefit of our soldiers, language which would deprive them of a reward for their valor and self-sacrifice? If we would understand what race prejudice really means try to imagine a case in which we should be trying to construe an act passed for the obvious benefit of our soldiers in such a way as to deprive them of that benefit. In frankly confessing to the possession of our share of race prejudice, we trust that we shall not be understood as showing the slightest disrespect to any court of this state. All that we ask is that we shall all, judges and lawyers, make a special effort to be certain that we shall put aside all prejudice and shall look upon petitioner as a soldier in our uniform and under our flag, and determine his rights accordingly.

May we close in the powerful words of Edmund Randolph at the trial of Aaron Burr, "and if you cannot exorcise the demon of prejudice you can chain him down to law and reason, and then we shall have nothing to fear."

Dated, San Francisco, April 2, 1921.

Respectfully submitted,

ALBERT H. ELLIOT,
Amicus Curiae.

3. DECISION OF THE COURT.

Sac. No. 3249. In Bank. July 26, 1923.

ICHIZO SATO, Petitioner and Appellant, vs. HARRY HALL, Clerk of the County of Sacramento, Defendant and Respondent.

(1) **NATURALIZATION—CITIZENSHIP—ORDER VOID ON FACE.**—An order admitting a person to citizenship which shows on its face that such person is a member of a yellow race and at the time of admission a subject of the Emperor of Japan is void.

(2) **ID.—VOID ORDER OF FEDERAL COURT—DECLARATION OF INVALIDITY—POWER OF STATE COURT.**—Jurisdiction to naturalize aliens as citizens is conferred alike upon federal and state courts, and if the certificate issued by a federal court is void a state court may so declare it.

(3) **JUDGMENTS—RIGHT OF ATTACK—APPLICABILITY TO FEDERAL COURTS.**—The rule that a judgment which shows on its face that it is invalid may be assailed in any court is applicable to judgments rendered by federal courts.

(4) **NATURALIZATION—NATIVE OF JAPAN—SERVICE IN WORLD WAR—INELIGIBILITY TO CITIZENSHIP—CONSTRUCTION OF ACT OF CONGRESS OF 1918.**—A member of the yellow race and native of Japan, who served in the United States Army in the World War, is not entitled to naturalization under subdivision 7 of section 4 of the Act of Congress of May 9, 1918, which provides that "any alien" who served either in the Army or Navy during such war is entitled to naturalization, since the term "any alien" must be presumed to have been used by Congress in the sense in which it has always been judicially interpreted by the court in reference to previous Naturalization Acts, limiting naturalization to the white and black races.

(5) **ACT OF CONGRESS OF JULY 19, 1919—LEGISLATIVE INTENT UNAFFECTED BY.**—The Act of July 19, 1919, which provides that any person of foreign birth who served in the military or naval force of the United States during the present war, after final examination and acceptance by the said

military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section four of the Act of June 29, 1906, as amended, and shall not be required to pay any fee therefor, and this provision shall continue for the period of one year after all the American troops are returned to the United States, does not express a different legislative intent from that of previous acts as to persons entitled to naturalization.

Appeal by petitioner from a judgment of the superior court of Sacramento County, Charles O. Busick, judge, refusing to permit registration of Japanese as an elector. Affirmed.

On hearing after judgment in district court of appeal, Third District (34 Cal. App. Dec. 678), affirming judgment of superior court refusing registration to a Japanese as an elector. Judgment of superior court affirmed.

For Appellant—Williams & Fenstermacher; Albert H. Elliot, *amicus curiae*.

For Respondent—J. M. Inman.

Petitioner appeals from a judgment of the superior court refusing to issue a writ of mandate to compel the defendant, the county clerk of Sacramento County, to place petitioner's name on the register of voters.

On January 21, 1919, petitioner was admitted to citizenship by the United States district court of the Territory of Hawaii, and a certificate of citizenship was thereupon issued to him. This certificate recites that he is a member of the yellow race, and that at the time of his admission he was a subject of the Emperor of Japan. Petitioner presented his certificate to defendant, and demanded that his name be placed on the register in order to qualify him to vote. The clerk declined to accede to this demand, and pleads as a justification for his action that members of the yellow race are not entitled to naturalization, and that the order admitting petitioner to citizenship is void on its face.

(1) The appellant contends that the order admitting him to citizenship is a final judgment of a court of competent jurisdiction, and that this judgment is conclusive as against collateral attack.

This position is untenable. The judgment or certificate shows that the petitioner is a member of a yellow race, and this showing renders the judgment void unless its integrity is preserved by some one of the acts to be hereafter noted. If petitioner were ineligible to citizenship, and this ineligibility appeared upon the face of the judgment of the court admitting him to citizenship, that court was without jurisdiction and its judgment was void.

In *Yamashita vs. Hinkle*, 43 Sup. Ct. Rep. 69, recently decided, certificates of naturalization were issued to two Japanese by the superior court of the State of Washington prior to 1906. The secretary of state of the State of Washington refused to receive and file articles of incorporation executed by the two Japanese upon the ground that they were not at the time of their naturalization and never had been entitled to naturalization under the laws of the United States, and therefore were not qualified to form the corporation proposed. The supreme court of the state refused a writ of mandamus to compel the secretary of state to issue and file the articles of incorporation, and the case was taken by a writ of *certiorari* to the Supreme Court of the United States, where Mr. Justice Sutherland, speaking for the court, said: "Upon the authority of *Takao Ozawa vs. United States*, *supra* (43 Sup. St. Rep. 65), we must hold that the petitioners were not eligible to naturalization, and as this ineligibility appeared upon the face of the judgment of the superior court, admitting petitioners to citizen-

ship, that court was without jurisdiction and its judgment was void. *In re Gee Hop* (D. C.), 71 Fed. 274; *In re Yamashita*, 30 Wash. 234, 70 Pac. 482."

(2) Petitioner's next contention is that, assuming that a federal court can set aside as void a certificate of naturalization issued by a state court, there are no cases in which a state court has declared void any certificate of naturalization issued by a federal court.

This contention is also without merit. Jurisdiction to naturalize aliens as citizens of the United States is conferred alike upon federal and state courts (Act of June 29, 1906, sec. 3, 34 Stats. at Large, 596), so we cannot see that it makes any difference whether it is a federal or a state court which issues the void certificate. In either case, if the certificate is void no rights are created under it, and no one is obliged to recognize it. It is true that the matter of naturalization is exclusively within the control of the Government of the United States, but in determining whether or not a state officer has acted properly in refusing to recognize a certificate of naturalization, alleged to be void upon its face, the state court must of necessity inquire whether the court issuing the certificate had jurisdiction.

(3) We therefore hold that the rule that a judgment which shows on its face that it is invalid may be assailed in any court, is applicable to judgments rendered by federal courts.

We then come to the question of whether petitioner is entitled under the general naturalization laws to the privilege of citizenship.

On May 9, 1918 (40 Stats. at Large, 542), Congress amended the naturalization laws by adding seven new subdivisions to section 4 of the Naturalization Act of 1906. This Act of June 29, 1906, entitled "An act to establish a bureau of immigration and naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," consists of 31 sections, and deals primarily with the subject of procedure, and it did not change the fundamental principles of existing law governing in such matters (*Ozawa vs. United States*, *supra*). We will quote that portion of the seventh subdivision of section 4 of the Act of 1906, as amended by the Act of 1918, pertinent to our inquiry:

"Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for re-enlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army * * * may, on presentation of the required declaration of intention, petition for naturalization without proof of the required five years' residence within the United States; * * * Any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; * * * and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, * * * provided he appears with his two witnesses before the appropriate representative of the bureau of naturalization and passes the preliminary examination hereby required before

filing his petition for naturalization in the office of the clerk of the court, * * *

Section 2 of the Act of May 9, 1918, which we will hereafter refer to as section 2, provides that:

"All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined. * * *

Section 2169 of the Revised Statutes, referred to in section 2 of the Act of May 9, 1918, reads as follows: "The provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." In all of the naturalization acts from 1790 to 1906 the privilege of naturalization was confined to white persons (with the addition in 1870 of those of African nativity and descent), although the exact wording of the various statutes was not always the same. (See *Ozawa vs. United States*, *supra*.)

The term "any alien" used in the seventh subdivision of the Act of 1918, standing by itself, would certainly be broad enough to include the petitioner; but as this term had been used in prior acts we must assume that Congress, in passing this law, acted with knowledge of all previous legislation and of its interpretation by the courts. We will refer to two acts of Congress granting the privilege of naturalization to aliens who had engaged in military service. The first of these, the Act of July 17, 1862 (12 Stats. at Large, 597), carried into the Revised Statutes as section 2166, and repealed by the Act of May 9, 1918, read as follows:

"Any alien, of the age of twenty-one years and upwards, who has enlisted, or may enlist, in the Armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; * * *

In 1908 a Japanese made application under this section, and it was held that section 2169 was controlling, and limited the privilege of naturalization to white persons and to those of African nativity or descent, and that it did not extend the right of naturalization to a person of the Japanese race, although having an honorable discharge. (*In re Buntaro Kumagai*, 163 Fed. 922.)

A statute of like import was passed by Congress and approved July 26, 1894. (28 Stats. at Large, 123, 124.) In *Bessho vs. United States*, 178 Fed. 245, the circuit court of appeals had before it this Act of 1894, authorizing the naturalization of "any alien" 21 years or more of age who had served in the United States Navy or Marine Corps, as therein provided. The court held that this act was limited by the provisions of section 2169, Revised Statutes, in view of the fact that in section 26 of the General Naturalization Act of 1906 Congress expressly repealed a number of sections of the Act of 1873 (as amended in 1875), but it did not mention as repealed section 2169, above quoted. The court construed this omission as a legislative implication that section 2169 was to continue as the law. This was in 1906, and, of course, long after the enactment of the statute of 1894, under which Bessho claimed the right of naturalization. The court denied the petition upon the ground that, although he was a Japanese subject who came within the terms of the Act of 1894 as having served in the Navy of the United States, he was not entitled to naturalization because he was a member of a race other than the white or black races.

We have, then, this highly suggestive condition: The Acts of 1862 (sec. 2166, Rev. Stats.), 1894 and 1918 all use the common term "any alien," and all of them refer to aliens who have served in the Army or Navy. We have shown that under the Acts of 1862 and of 1894 there is no question that the words "any alien" means any alien of the white or black races. The matter stood in this shape when Congress enacted the Act of 1918. Since we know that these words in the earlier acts are limited to aliens of the white and black races, we are compelled to assume with equal certainty that the words are used throughout in the same sense. Congress cannot have deliberately enacted the statute of 1918 with the expectation that a new and special meaning should be accorded to these words. If these decisions were, as asserted by petitioner, erroneous, it seems to us all the more reason why Congress would have used in the Act of 1918 some phrase other than "any alien" in order to show that it disapproved of these decisions; but as Congress did not do so, we must presume that it used the term "any alien" in the sense in which it had been judicially interpreted.

This brings us to a consideration of the meaning of section 2 of the Act of 1918, to which we have referred above, and which provides that nothing in that act shall repeal or in any way enlarge section 2169, Revised Statutes, except as specified in the seventh subdivision of the act and under the limitation therein defined. The clear implication is that section 2169 is not to be repealed, except as it is enlarged by the specifications and limitations contained in the seventh subdivision. In the seventh subdivision, Filipinos, who are neither aliens nor citizens (*In re Alverto* [D. C.], 198 Fed. 688), and those Porto Ricans not citizens, are given the privilege of citizenship. Thus we find an enlargement of section 2169, extending the right to persons who are neither aliens nor white persons. Petitioner, in order to rebut the inference that Congress intended to make Filipino and Porto Rican soldiers and sailors the only ones excepted from the restrictions of section 2169, Revised Statutes, contends that since the expression "any alien" did not include Filipinos and Porto Ricans, it was necessary for Congress to specifically mention them in subdivision 7, in order that they would share the same privileges as "any alien."

This argument is not sound. If Congress mentioned Filipinos and Porto Ricans in subdivision 7 merely to put them on an equality with "any alien," why were the provisions regarding their naturalization stricter than those terms upon which "any alien" could be naturalized? It will be noticed that, in order to come within the purview of the Act of 1918, both Filipinos and Porto Ricans must have declared their intention to become citizens of the United States, and Filipinos must also have had three years' military service, while "any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States."

Further, if petitioner's interpretation is correct, it was only necessary for Congress to say in section 2 "*That all acts and parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed*"; and section 2169 would be repealed in so far as "aliens, Filipinos, and Porto Ricans" who had seen the required military service were concerned. But when Congress continued and said, "*but nothing in this act shall repeal or in any way enlarge section 2169, R. S., except as specified in the seventh subdivision of this act and under the limitation therein defined,*" it is clear that section 2169, Revised Statutes, is to stand, except as to Filipinos and

Porto Ricans. (Italics ours.) In short, after having said that section 2169 was not to be repealed, it was necessary for Congress to add, "except," etc., because as a matter of fact there were two classes mentioned in subdivision 7, namely, Filipinos and Porto Ricans, who were neither free white persons nor of African descent or nativity.

We are not without authority for this construction of the Act of 1918. In the *Petition of Charr* (D. C.), 273 Fed. 207, recently decided, it was held that petitioner, a Korean, a subject of Japan, who had been in the military service, was not entitled to citizenship under the Act of 1918. Referring to the effect of section 2, the court said: "The exceptions referred to must have been the races especially mentioned in the seventh subdivision, and the limitation was the military or naval service performed. In other words, under the general law, neither a Filipino nor a Porto Rican could necessarily have been admitted to citizenship. Under this subdivision, he may be, irrespective of race, if he has performed the service specified." In *In re Para* (D. C.), 269 Fed. 643, the court reached the same result, denying certificates to a South American Indian and to a Japanese, who had served in our military forces during the late war. In the course of its opinion, the court said: "If the words 'any alien' are to be taken literally, not only would a meaning be given wholly contrary to existing judicial interpretation, but all the definitions of section 2169 would be rendered meaningless, and even Chinese who had served in the army could be naturalized, in spite of the express language to the contrary. However worthy may have been the military services of the petitioners, I can find no warrant in the statutes for their naturalization. The words 'any alien,' appearing in the Act of May 9, 1918, are subject to prior judicial interpretation, and in my opinion embrace only such aliens as could theretofore have been admitted to citizenship, and merely provide more expeditious and favorable terms of admission than before existed."

In this contention, it is significant to note that in *Ozawa vs. United States*, *supra*, in which it was held that one of the Japanese race and born in Japan was not eligible to citizenship under our naturalization laws, one of the questions certified to the Supreme Court by the circuit court of appeals was, "If said Act of June 29, 1906, is limited by section 2169, and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?" The answer given to this question by the Supreme Court of the United States was, No. In view of the fact that many courts were being called upon to decide the status of Japanese who had seen military service, we are convinced that the Supreme Court had such Japanese in mind when it said that under no conditions could a Japanese born in Japan be eligible to naturalization.

If the Act of 1918 is ambiguous, then according to well-recognized principles of statutory interpretation, in order to ascertain the intention of Congress, we may look to the debates and discussions attending the passing of the act. (*Holy Trinity Church vs. United States*, 143 U. S. 457; *Heydenfeldt vs. Daney Gold etc Co.*, 93 U. S. 634.) A careful reading of the Congressional Record will show that the committee which reported the bill to Congress, in response to questions from the floor, repeatedly said that the act would not apply to those not capable of citizenship. We will quote a paragraph from a speech in Congress by one of the framers of the bill. He said in part: "Subdivision 7 has been prepared for the purpose of unifying the rules of exemptions extended to certain aliens, who have received military training in armies of the United States and in the Philippine

Islands as well as those serving on vessels of the United States Government and American merchant marine. It also makes the first enlargement ever authorized of the provisions of section 2169, by allowing Filipinos who have served in the United States Navy or Marine Corps or the Naval Auxiliary Service, and have been honorably discharged therefrom after the term of enlistment specified in the petition for naturalization under the conditions and limitations defined in the seventh subdivision, and includes all those who are at present in the military service of the United States, whether they have declared their intention or not. * * * In the general repealing portion of the section the provision as to the effect of this act upon section 2169 of the Revised Statutes, is clearly shown not to enlarge it in any way except as to the Filipinos who have performed the service in the Navy as defined in subdivision 7." (Congressional Record, May 3, 1918, pp. 6022-3.) It appears also from the discussion before the committee which drafted the amendment that it was clearly intended to give the amendment the construction herein reached.

(5) Our attention has been called to the Act of July 19, 1919 (41 Stats. at Large, 222), which reads as follows:

"Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section four of the Act of June 29th, 1906 (34 Stats. at Large, part 1, p. 596), as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States."

It will be noticed that petitioner's naturalization preceded the enactment of this statute, but it is claimed that this statute being the latest legislative expression of this subject matter, evinces a congressional intent to include all aliens, soldiers and sailors who complied with the terms of the statute. This act appears to extend the period of six months specified in said subdivision 7 to one year, to extend its provisions to aliens serving during the present war to one year after their discharge and to dispense with the payment by them of any fee. It makes no other changes. In the *Petition of Charr, supra*, in speaking of the Act of 1919, the court said:

"Because of the importance of the question involved and the earnestness of counsel, the court has made further investigation of the proceedings in Congress attending this legislation, in order, if possible, to ascertain the intent and purpose of that body in view of the claimed ambiguity in the language employed. This enactment appears in the naturalization section of the Sundry Civil Act, Public No. 21, 66th Congress. It is not mentioned in the report on the bill, and a search of the Congressional Record discloses that it was not mentioned in any of the debates, either in the House or Senate, and therefore there is nothing in the records of Congress to show the intent of Congress as to this particular section. * * * It would seem, therefore, that this clause of the naturalization section of the act approved July 19, 1919, was simply attached as a rider to an appropriation bill, and went through without scrutiny or debate by either house. It cannot, therefore, in the absence of language clearly expressing that purpose, be held to relax the provisions of the prior Act of May 9, 1918, which have been duly considered."

In view of the fact that the discussions preceding the enactment of the Act of 1918 emphatically show that Congress did not intend to include

within the scope of that act persons not otherwise entitled to citizenship, we cannot believe that it would have changed this policy after the war was over, without mature consideration. Therefore, we do not regard the Act of 1919 as expressing a different legislative intent from that of the previous acts.

As was said in a recent case, it may be conceded that the services rendered by the petitioner should be appropriately rewarded; but the privilege of citizenship resting with Congress, and with Congress alone, the courts have no power to alter or extend the provisions of law to that end. We are constrained to hold that the petition was properly denied and, accordingly, the judgment of the trial court is affirmed.

KERRIGAN, J.

We concur:

SEAWELL, J.

WASTE, J.

MYERS, J.

LAWLOR, J.

RICHARDS, J. *pro tem.*

CHAPTER IV.—TOYOTA CASE.

UNITED STATES vs. HIDEMITSU TOYOTA.

IN THE MASSACHUSETTS DISTRICT COURT.

(No. 58,600, Naturalization.)

OPINION.

(May 28, 1923.)

Lowell, J. This is a petition brought under section 15 of the Act of June 29, 1906 (U. S. Comp. Stats., sec. 4374), to cancel a certificate of naturalization issued to Hidemitsu Toyota on May 16, 1921. The case was very ably presented by counsel, with a full citation of authorities.

It is contended that Toyota, while in every way qualified on other grounds to be admitted to naturalization, was not eligible as he is a Japanese. He was admitted under the provisions of the Act of July 19, 1919 (U. S. Comp. Stats., sec. 4352 aaa). This statute reads as follows:

“Any person of foreign birth who served in the military or naval forces of the United States during the present war, * * * (who) shall have been honorably discharged * * * shall have the benefits of the seventh subdivision of section 4 of the Act of June 29, 1906, * * * as amended; and this provision shall continue for the period of one year after all the American troops are returned to the United States.”

Toyota comes within the provisions of this statute and was properly admitted if it applies to a man of the Japanese race.

It has been the settled policy of the United States since the beginning not to allow the naturalization of any person unless he was a free white person. An exception to this was made in 1870, when persons of African nativity or African descent, were added to the list of eligibles. There is no question that a Japanese who has not served in the Army or Navy of the United States cannot be admitted to naturalization. (*Re Saito*, 62 F. R. 126; *In re Yamashita*, 40 Wash. 234; *Ozawa vs. United States*, 43 S. C. Rep. 65.)

It is contended, however, that a different rule applies to persons who have been in the United States military or naval service. This has been denied in two well-considered recent opinions. (*Re Para*, 269 F. R. 643;

Petition of Charr, 273 F. R. 207. See, also, *In re Kumagai*, 163 F. R. 922; *In re Knight*, 171 F. R. 299; *Bessho vs. United States*, 178 F. R. 245.)

An unreported decision of Judge Vaughan of the district court of Hawaii, a copy of which was given me, was to the contrary effect.

I am of the opinion that the two recent cases above cited lay down the proper rule of law. It would serve no useful purpose to repeat the reasons given therein.

The petition is granted, and an order vacating the order of naturalization may be issued.

Endorsed: No. 54, Naturalization Docket. *In re Hidemitsu Toyota*. Opinion United States district court. Filed in Clerk's office May 28, 1923, Mass. Dist.

PART II

CASES AFFECTING CONSTITUTIONAL
AND TREATY RIGHTS

CHAPTER I.—ALIEN POLL TAX TEST CASE (TERUI CASE).

In the Matter of the Application of HEIKICH TERUI for a writ of *Habeas Corpus*.

IN THE CALIFORNIA SUPREME COURT.

Crim. No. 2390.

1. BRIEF ON BEHALF OF PETITIONER, BY ALBERT H. ELLIOT.

STATEMENT OF THE CASE.

This is an original proceeding on behalf of an alien male inhabitant of the State of California of the age of about thirty-five (35) years, and a subject of the Emperor of Japan.

The petitioner is arrested and held in custody by the chief of police under a warrant issued by the police court of the City of Oakland, and he is charged with being guilty of a misdemeanor under section 3855, title 9, part 3, of the Political Code. The said section is a part of the so-called Alien Poll Tax Law, passed by the legislature during the session of 1921 and signed by the governor May 25, 1921.

The said section reads as follows:

"3855. Every person subject to the payment of the poll tax hereby imposed who shall:

"1. Fail, neglect or refuse to register as herein provided; or

"2. Falsely state his age to be under twenty-one years or over sixty years, for the purpose of evading such tax; or

"3. Give or lend to another any certificate of registration or poll tax receipt issued to him hereunder; shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished in the manner provided by law."

The specific charge against petitioner upon which he was arrested is that he failed, neglected and refused to register as provided by the section above quoted.

The so-called Alien Poll Tax Law is entitled "An act to add a new chapter to title nine of part three of the Political Code, to be numbered chapter nine thereof, embracing sections three thousand eight hundred thirty-nine to three thousand eight hundred fifty-six, both inclusive, providing for the levy and collection of poll taxes pursuant to the provisions of section twelve of article thirteen of the state constitution as adopted November 2, 1920."

Section 3839 of the act provides that "every alien male inhabitant" of the state over twenty-one (21) years of age and under sixty (60), except paupers, idiots and insane persons, must annually pay a poll tax of ten (\$10.00) dollars. For the year 1921 the tax must be paid on or before December 31, or the same will be delinquent and thereafter bear interest at the rate of seven (7%) per cent per annum together with a fifty (50%) per cent delinquency, and each year after 1921 the tax becomes delinquent on the 31st day of July.

Section 3840 requires "every person liable to pay such poll tax to register annually", sets forth the data which the alien must furnish under oath, and provides that for the year 1921 registration must be completed by July

31, and in all subsequent years on or before the Saturday preceding the first Monday in March.

Section 3841 sets forth in elaborate detail the machinery for accomplishing registration.

Section 3842 sets forth the duties of treasurers in providing tax receipts and the form of the receipt.

Section 3843 sets forth how the treasurers must sign receipts and deliver same to the auditors.

Section 3844 provides that the auditors must sign the poll tax receipts and deliver them to the assessors.

Section 3845 provides that the assessors are charged with the duty of collecting the poll tax, how the assessors' deputies are appointed and their duties, and compensation and the fees allowed for collection.

Section 3846 provides that the assessors may seize the personal property of persons liable for the payment of the tax and may sell the personal property after three hours' verbal notice of the time and place, in accordance with the Political Code.

Section 3847 provides for the garnishment of debts or wages due the person subject to the poll tax, the proceedings for garnishment, the duties of employers on garnishment of employees' earnings or credits, the duty of debtors on garnishment of debts due creditors, and the duties of contractors on the garnishment of employees' earnings or credits.

Section 3848 makes the poll tax receipt the only evidence of payment, provides that the holder must exhibit his receipt within three days after request or have no recourse against an employer or creditor for money paid to the assessor serving the notice.

Section 3849 provides for the certification by the assessor to the tax collector of the names of persons on the current assessment roll who have not paid the poll tax, provides that the tax collector shall charge the delinquent poll tax on the assessment rolls and collect the same, and for the delivery by the assessor to the tax collector of \$15.00 receipts and the duties of the tax collector and auditor thereon.

Section 3850 provides for the settlements to be made by the assessors.

Section 3851 provides for the return of unused receipt and other details of settlement between the auditor and treasurer.

Section 3852 provides for the powers of boards of supervisors in correction of poll tax roll.

Section 3853 provides that the net proceeds of the poll tax shall go into the unapportioned county school fund.

Section 3854 provides that the attorney-general shall prepare the forms, provides for the cost of printing the forms out of the unapportioned county school fund, provides for the duties of the treasurer, superintendent of schools, and auditors, and details with respect to the receipts.

Section 3855 has already been quoted in full and provides penalties for non-registration, false statements, evasion or abetting.

Section 3856 provides for recovery of the tax after final judgment if the same has been wrongfully collected and the duties of the superintendent of schools, auditor and treasurer in the matter of repayment, and the non-liability of any public officer personally in connection with the matter.

Under the terms of the act it is provided that since the act provides for a tax levy within the meaning of section one, article four, of the state constitution, the act shall take effect immediately.

THE LAW OF THE CASE.

Petitioner contends that he should be discharged on *habeas corpus* for the following reasons:

(a) The act, under which petitioner was arrested, is invalid as to petitioner, who is a Japanese subject, under the treaty now existing between the United States of America and the Emperor of Japan.

(b) The said act is unconstitutional and void as to petitioner and all alien persons under the Fourteenth Amendment to the Constitution of the United States.

(c) The said act is unconstitutional and void under section 24, article IV, of the constitution of the State of California.

(Note—We have set forth, as addenda to this brief, the Alien Poll Tax Act and the treaty with Japan.)

I.

THE ALIEN POLL TAX ACT IS IN CONFLICT WITH THE TREATY BETWEEN JAPAN AND THE UNITED STATES, PROCLAIMED APRIL 5, 1911, AND SO FAR AS JAPANESE ALIENS ARE CONCERNED, SAID ACT IS EITHER INVALID OR INAPPLICABLE.

Article I of the treaty between the United States and Japan, which was proclaimed April 5, 1911, and the second paragraph of which is pertinent to the subject under discussion, reads as follows:

"Article 1.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

A treaty is the supreme law of the land, and any state statute in conflict with a treaty is either rendered invalid or is suspended during the existence of the treaty.

Article VI of the Constitution of the United States reads in part as follows:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

"The primary purpose of the clause in the Constitution declaring treaties to be the supreme law of the land was to ensure their faithful observance without the aid or intervention of legislation on the part of the states, anything in the constitution or laws of the states to the contrary notwithstanding." (Treaties, Their Making and Enforcement, Samuel B. Crandall, sec. 70, p. 153, etc.)

In the old case of *Ware vs. Hylton*, 3 Dall. 199, 236, decided by the Supreme Court, Mr. Justice Chase, in the leading opinion, said:

"A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it, can it be questioned whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but avoidable only by a repeal or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole."

"The principle is now well established that a treaty duly made under the authority of the United States is as much a part of the law of every state, of which its courts must take notice and enforce, as its own local laws and constitution, and in case of conflict the treaty must prevail." (Pp. 159-160, Crandall [*supra*].)

"* * * In 1829, just forty years after the Constitution went into operation, the same great judge, after noting the contractual nature of a treaty and its usual dependence for infra-territorial operation upon subsequent acts of the respective parties, said: 'In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision.' Although a treaty is primarily a contract between nations, it operates by virtue of article VI of the Constitution as a municipal law, and so far as it prescribes a rule by which rights of individuals under it may be determined the courts look to the treaty as they would to a statute for a rule of decision." (Sec. 71, p. 160, Crandall [*supra*].)

Mr. Calhoun, in the debate in the House of Representatives January 9, 1816, speaking with respect to the Treaty of Commerce with Great Britain of July 3, 1815, said:

"The limits of the former (legislative power) are exactly marked; it was necessary to prevent collision with similar co-existing state powers. * * * In our relation to the rest of the world the case is reversed. Here the states disappear. Divided within, we present the exterior of undivided sovereignty. * * * Whatever, then, concerns our foreign relations; whatever requires the consent of another nation, belongs to the treaty power; can only be regulated by it; and it is competent to regulate all such subjects; provided, and here are its true limits, such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our Government, nor can it do that which the Constitution has expressly forbade to be done; * * *. The treaty-making power has, indeed, been regarded to be so comprehensive as to embrace, with few exceptions, all questions that can possibly arise between us and other

nations, and which can only be adjusted by their mutual consent, whether the subject matter be comprised among the delegated or the reserved powers."

McKcown vs. Brown (1914), 149 N. W. 593, 595:

"It is elementary that treaty provisions between the United States and a foreign nation have force and effect paramount to acts of state legislation."

Baker vs. City of Portland (1879), 5 Sawy. 566:

"The state cannot legislate so as to interfere with the operation of this treaty or limit or deny the privileges or immunities granted by it to the Chinese residents of this country. * * * So far as this court and the case before it is concerned, the treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether."

Tiburcio Parrott (1880), 6 Sawy. 349-366:

"There can be no mistaking the significance or effect of these plain, concise, emphatic provisions (art. I, sec. 20, art. II, sec. 2, and art VI of the Constitution). The states have surrendered the treaty-making power to the General Government, and vested it in the President and Senate; and when duly exercised by the President and Senate, the treaty resulting is the supreme law of the land, to which not only state laws, but state constitutions, are in express terms subordinated. * * *"

"* * * No state can set up its laws as against the grant of any particular right, privilege or immunity any more than against the grant of any other right, privilege or immunity. No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the President and Senate in exercising a power committed to them and prohibited to the states by the Constitution." (P. 258, Crandall [*supra*].)

Maiorano vs. Baltimore & Ohio R. R. Co., 213 U. S. 268, 272:

"We do not deem it necessary to consider the constitutional limits of the treaty-making power. A treaty, within those limits, by the express words of the Constitution, is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."

"The treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations, but ordinarily treaties relate to such matters as alliances; cessation of hostilities, cession of territory; international boundaries; the rights of citizens or subjects of one of the nations residing in the territorial limits of the other; the settlement of claims of the citizens of one government against the other government for damages and injuries; the rights, powers, duties and jurisdiction of consuls and diplomatic agents; commercial intercourse with other nations, and the extradition of criminals * * *. A treaty, then, is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, the court resorts to the treaty for a rule of decision for the case before it as it would to a statute. All courts,

state and national, must take judicial notice of and be governed by a treaty of the United States. * * * (26 Ruling Case Law, p. 926.)

It should be stated that there are limitations to the treaty-making power as vested by the Constitution in the President and Senate.

It is not easy, however, to enumerate these limitations. No cause has arisen in which a treaty has been declared unconstitutional by the Supreme Court. Furthermore it may be said that no limitation on the treaty-making power of the General Government can be found except certain "suggested" limitations arising within the acknowledged police powers of the state.

As Mr. Justice Sawyer said in *In re Wong Yung Quy* (1880), 6 Sawy. 442, 451:

"Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, or to a subject matter within the acknowledged police power of the state."

This case involved the right of a Chinese to remove from the place of burial the remains of a deceased person without obtaining a permit and paying a fee of ten (\$10.00) dollars.

Also in a liquor case, *Cantini vs. Tillman*, 54 Fed. 969, 976, it was said:

"The police power is a right reserved by the states and has not been delegated to the General Government. In its lawful exercise, the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations."

In a quarantine law case, *Compagnie Francaise etc. vs. State Board of Health*, 51 La. Ann. 645, 662, the court said:

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the rightful exercise of the police power of the different states, in aid of the protection and preservation of the public health within their respective borders."

This case was affirmed by the Supreme Court on the ground, however, that there was no conflict between the statute in question and the treaty, because the treaty was not intended to and did not deprive the United States of those powers necessarily inherent in it and essential to the health and safety of its people. Even here, however, doubt seems to have been expressed by the dissenting opinions of two justices, Mr. Justice Brown saying:

"Necessary as efficient quarantine laws are, I know of no authority in the states to enact such as are in conflict with our treaties with foreign nations."

We have dwelt upon the possible limitation on the treaty-making power of the General Government (doubtful as the existence of such limitation is) for the purpose of demonstrating affirmatively that no contention may be successfully made to the effect that the General Government did not have the power to negotiate a treaty with Japan on the subject matter of taxation, or rather discrimination in taxation as between citizens and aliens. Surely it is not necessary that we spend time arguing that a statute levying a poll tax on alien Japanese is not within the police powers of the State of California as involving either the public health, the public safety, the public morals or the common welfare.

The construction of the treaty between Japan and the United States.

The reading of the second paragraph of article 1 of the treaty is so plain that it would not seem to be necessary to apply any principles of

construction whatever other than an insistence that words be given their plain meaning.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects."

"* * * A treaty is to be construed on principles similar to those applied to other contracts and statutes. Anything necessarily implied is as though inserted. In the construction of treaties, words are to be taken as understood in the public law of nations, and not in any artificial or special sense impressed by local law, unless the restricted sense is clearly intended. Where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." (26 R. C. L., pp. 926, 927.)

Miscellaneous citations.

We are tempted to step aside a moment from the strict line of our argument to suggest the essential unfairness of the Alien Poll Tax Act, hurled as it is in the very teeth of the treaty, and we are wondering what the attitude of the Government of the United States would be if its citizens were subjected to unfair and discriminatory tax legislation by a country with which we had a plain treaty. The following quotations may suggest an answer to our question:

"Citizens of the United States in Colombia are exempted from paying any tax from which the subjects or citizens of another power are exempt, both by the 'favored nation' clause of our treaty of 1846 with Colombia, and by the general principle of the law of nations which justifies this Government in insisting that there shall be no undue discrimination against citizens of the United States where they may be resident."

"* * * The imposition by Mexico of a tax unduly discriminating against citizens of the United States, if not a breach of the treaty between the United States and Mexico, is an unfriendly act to be noticed by the United States." (Moore International Law Digest, vol. II, p. 57.)

In concluding this branch of our argument we are fully advised of the fact that only those aliens are bound to register under 3840 P. C. who are "liable to pay such poll tax", and that only those aliens who are "subject to the payment of the poll tax" under 3855 P. C. can be guilty of a misdemeanor by refusing to register. In other words, it may be argued, in view of the treaty with Japan, that the Alien Poll Tax Act was never intended by its provisions to apply to a Japanese alien. Manifestly a decision to this effect would release the petitioner on *habeas corpus* and would determine that Japanese aliens are neither obligated to pay the tax nor to register. A decision placed upon that ground, however, would leave the Alien Poll Tax Act in existence and applicable to any alien national with whose government there was no treaty containing a provision similar to the above-quoted portion of the Japanese treaty, or the provision known as "the most favored nation clause".

A decision, however, under the next point which we raise would invalidate the Alien Poll Tax Act on the ground of its unconstitutionality and would release *any* alien from the obligation of either registering or paying the poll tax under the act.

II.

THE SO-CALLED ALIEN POLL TAX ACT IS VOID AND UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

We shall not pause to cite authorities on the point that the word "person" as used in the following portion of article XIV of the Constitution

of the United States (the Fourteenth Amendment) includes aliens, as well as citizens:

"* * * Nor deny to any person within its jurisdiction the equal protection of the laws."

In the case of *Tiburcio Parrott* (cited *supra*), in which the provision in the constitution of the State of California which attempted to prohibit any corporation from employing Chinese was declared to be void and of no effect, both Justices Sawyer and Hoffman found "the inhibitions of the Fourteenth Amendment sufficient to cover the case."

In the case of *Ah Chong*, 6 Sawy. 451, a California statute which prohibited all aliens incapable of becoming electors of the state from fishing in the waters of the state was declared to violate the Fourteenth Amendment of the Constitution as well as certain stipulations in the Chinese treaty.

In the case of *Lee Sing*, 43 Fed. (1890) 359, an ordinance of the City of San Francisco which declared it to be unlawful for any Chinese to locate and reside or carry on business within the limits of the City and County of San Francisco, except in a certain prescribed district, was also held to be in conflict with the Fourteenth Amendment as well as a violation of the Chinese treaty.

In *Gondolfo vs. Hartman*, 49 Fed. (1892), Judge Ross held that a covenant in a deed not to convey or to lease to a Chinese was in contravention of our treaty with China and not enforceable in a court of equity; also that the inhibitions of the Fourteenth Amendment of the Constitution applied.

In the case of *Quong Woo*, 13th Fed. (1882) 229, Justice Steele held an ordinance of the City and County of San Francisco which arbitrarily prohibited the conduct of the laundry business within certain sections of the city was in contravention of the treaty with China and void, and also was against the Fourteenth Amendment.

In *Yick Wo vs. Hopkins*, 118 U. S. 356, the Supreme Court held that the subjects of the Emperor of China were entitled to enjoy the protection guaranteed by the Constitution and that the ordinance in question, if administered so as to make arbitrary and unjust discriminations, founded on differences of race, between persons otherwise in similar circumstances, was void.

Juniata Limestone Co. vs. Fagley, 187 Pennsylvania State 193 (July, 1898):

This case presents the situation of a bill in equity to restrain the collection of a tax under a statute of Pennsylvania, the said tax being a tax of three cents imposed on every employer of an unnaturalized alien, for each day that the alien should be employed. The act was declared unconstitutional "because it offends against the Fourteenth Amendment to the Constitution of the United States". The court in the opinion says:

"The act in question clearly belongs to a vicious species of class legislation which too often finds its way into our statute books, and we have no doubt as to its unconstitutionality on both grounds indicated by the learned president of the court below. It has already been adjudged void by the circuit court of the United States of the Western District of Pennsylvania. * * * 'The equal protection of the laws declared by the Fourteenth Amendment to the Constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances.' (Railroad Tax Cases, 13 Fed. Rep. 722, 733.)

"In that case the court said: 'Unequal exactions in every form, or under any pretense, are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here.' (*Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, 165.) In the last cited case Mr. Justice Brewer said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

See also strong case of *Frazer vs. Torley Co.*, 82 Fed. 257, which is cited with approval and at length in *Raich vs. Truax*, 219 Fed. 273 (lower court).

Truax vs. Raich, 239 U. S. 33 (Nov. 1, 1915):

In this case an act passed under the initiative provision of the constitution of Arizona "provides that every employer (whether a corporation, partnership or individual) who employs more than five workers at any one time, 'regardless of kind or class of work, or sex of workers', shall employ 'not less than eighty per cent qualified electors or native-born citizens of the United States or some subdivision thereof'"—was under review. In deciding that this act was invalid and unconstitutional under the Fourteenth Amendment Mr. Justice Hughes said:

"The question, then, is whether the act assailed is repugnant to the Fourteenth Amendment. Upon the allegations of the bill it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union (see *Gegiow vs. Uhl, Commissioner*, decided October 25, 1915, 239 U. S. 3, 36 S. Ct. 239, 60 U. S. [L. Ed.] 114). Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description—'any person within its jurisdiction'—as it has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369 (6 S. Ct. 1064, 30 U. S. [L. Ed.] 220), referring to the due process and equal protection clauses of the amendment, 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.' (See, also, *Wong Wing vs. U. S.*, 163 U. S. 228, 242 [16 S. Ct. 977, 41 U. S. (L. Ed.) 140]; *U. S. vs. Wong Kim Ark*, 169 U. S. 649, 695 [18 S. Ct. 456, 42 U. S. (L. Ed.) 890].) The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against (40) both aliens and the citizens of other states. Thus in *McCready vs. Virginia*, 94 U. S. 391, 396 (24 U. S. [L. Ed.] 248), the restriction of the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in *Patsone vs. Pennsylvania*, 232 U. S. 138, 145, 146 (34 S. Ct. 28), 58 U. S. (L. Ed.) 539, where the discrimination against aliens upheld by the court had for its

object the protection of wild game within the state, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein vs. Lynham*, 100 U. S. 483 [25 U. S. (L. Ed.) 628]; *Blythe vs. Hinckley*, 180 U. S. 333, 341, 342 [21 S. Ct. 390, 45 U. S. (L. Ed.) 557]); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise. * * *

Aliens are within the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as fully as citizens, subject only to the following exceptions:

(a) It is possible that the states may lawfully prohibit alien ownership of land within their respective boundaries, there being no treaty to the contrary. (*Chirac vs. Chirac*, 2 Wheat. 259, 272; *Hauenstein vs. Lynham*, 100 U. S. 483, 484; *DeVaughan vs. Hutchinson*, 165 U. S. 566, 570; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs. Hinckley*, 180 U. S. 333.)

(b) The right to take the common property of the state, such as game and fish, may be limited to citizens of the state. (*McCready vs. Virginia*, 94 U. S. 391.)

(c) The state or any municipality therein, there being no statute to the contrary, may refuse to employ any but citizens on public work. (*Atkin vs. Kansas*, 191 U. S. 207; *Heim vs. McCall*, 239 U. S. 175.)

(d) The right of the elective franchise may be limited to citizens of the respective states.

The case of *Lin Sing vs. Washburn*, decided by the supreme court of California July, 1862, and found in 20 Cal. 534, is interesting because an act of the legislature of California was therein held invalid under the Constitution of the United States before the passage of the Fourteenth Amendment.

The act in question was clearly a tax act, discriminating against Chinese. Section 1 of the act reads in part as follows:

"There is hereby levied on each person, male and female, of the Mongolian race, of the age of eighteen years and upwards, residing in this state (California), except such as shall, under laws now existing, or which may hereafter be enacted, take out licenses to work in the mines, or to prosecute some kind of business, a monthly capitation tax of two dollars and fifty cents; which tax shall be known as the Chinese Police Tax
* * *"

In the course of the argument the attorneys for the Chinese argued that:

"The moment you acknowledge the right of a state legislature to tax a foreigner, because he is a foreigner, that moment you abandon to the states an absolute power over foreigners within their own limits. In the Passenger cases, Mr. Justice Grier said: 'A right to exclude is a power to tax; and the converse of the proposition is also true, that a power to tax is power to exclude.' (7 Howard 461.)"

The Supreme Court, in holding the act unconstitutional and void, says in part:

"It imposes upon them a tax, but contains no provision denying to them a residence in the state; and the question is not whether they can be excluded as burdensome or dangerous persons, but whether they can be taxed for the privilege of residing here, without reference to their condition or character. That they may be taxed as other residents is not disputed,

but that they may be set apart as special subjects of taxation, and be compelled to contribute to the revenue of the state in their character of foreigners, is a proposition which cannot be maintained. If this may be done, there is no restriction upon the power that does it, and a tax may be imposed which no human industry can pay, precluding all intercourse, and making it as impossible as if it were positively prohibited. The question is one of power, and if we admit the power we must admit it in its whole extent, as a power complete in itself, to be exercised at the discretion of the legislature, and subject to no limitation or restraint. If it exists, it may be exercised upon all foreigners residing in the state, and may be so exercised as to bar the door of foreign commerce as effectually as the Government could do by issuing its mandate and closing the ports. The fact that a power may be abused is no evidence that it does not exist; *but where an inferior jurisdiction asserts a power in conflict with that of a superior jurisdiction, the inference that the power asserted does not exist is inevitable.* And to determine whether there is a conflict or not, the power must be considered with reference to its consequences, for its effect when carried out is the only criterion by which a judgment can be formed." (Italics ours.)

We may add that if, under the commerce clause of the Constitution, an act such as is involved in the above case is held unconstitutional, how much the more should the act in the instant case be held to be unconstitutional under the clear provisions of the Fourteenth Amendment.

In concluding this branch of the argument, we have been unable to find any authorities sustaining the constitutionality of any tax statute which discriminates between citizens and aliens. Nor do we believe that any state statute which arbitrarily uses alienage as its only basis of classification in the levy of a tax can be sustained under the Fourteenth Amendment.

The Alien Poll Tax Act also is invalid because it is directly in the teeth of the so-called Civil Rights Statutes, which were passed by Congress to make effective the Fourteenth Amendment.

Section 10 of chapter 114 of the Act of Congress of May 31, 1870 (being R. S. 1977, U. S. Compiled Statutes, sec. 3925), reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." (Act May 31, 1870, c. 114, § 16, 16 Stat. 144.)

Syllabus: "This section, so far as it confers rights, is not limited to negroes and colored persons. It confers rights on white persons, and puts in the form of statute what has been substantially ordained by the Constitution." (*Kentucky vs. Powers* [C. C. 1905], 139 Fed. 452.)

Once we concede that aliens are included in the words "any person", as used in the Fourteenth Amendment (see cases cited *supra*) and that the expression "poll tax," as used in the statute under review, is included in the words "taxes, licenses, and exactions of every kind" (*supra*), the conclusion is inevitable that the Alien Poll Tax Act is in hopeless conflict with the Fourteenth Amendment and the Equal Civil Rights Statutes passed to enforce the Fourteenth Amendment.

THE ALIEN POLL TAX ACT IS UNCONSTITUTIONAL UNDER SECTION 24, ARTICLE IV, CONSTITUTION OF THE STATE OF CALIFORNIA.

Section 24 reads in part as follows:

"Sec. 24. Every act shall embrace but one subject, which subject shall be expressed in its title. * * *"

It will be observed from an examination of the title of the act (quoted *supra*) that there is no indication in the title or suggestion of the elaborate plan of registration of aliens with which the greater part of the act is concerned. It will be further observed that the reference in the title to section 12 of article 13 of the state constitution also gives us no suggestion as to any plan of registration. Section 12 of the constitution, as adopted November 2, 1920, reads as follows:

"Sec. 12. The legislation shall provide for the levy of an annual poll tax, and the collection thereof by assessors, of not less than four dollars on every alien male inhabitant of this state over twenty-one and under sixty years of age, except paupers, idiots and insane persons. Said tax shall be paid into the county school fund in which county it is collected."

We call particular attention further to the point that while it is not made a misdemeanor by the terms of the act for the alien to refuse to pay the poll tax, his refusal to register is made a misdemeanor and yet the title of the act does not indicate directly or indirectly the necessity of registration. In fact it may be well argued that the levy and collection of a poll tax does not necessarily require the machinery of registration and if the purpose of the title to an act be to inform a citizen or alien generally as to the aims and objects of the act, the title of the act under consideration is hopelessly defective. If a citizen or alien may not discover from the title of an act whether or not his failure to conform thereto would land him in jail, then we can see no purpose in titles and no force in the constitutional requirement that every act shall embrace one subject which "shall be expressed in its title".

We make the further point that all the proposed sections of the Political Code which are contained in title 9, as provided by the title of the act, are new sections, obviously, and the reference to said sections does not aid in the least in determining the subject matter of the act.

Syllabus: "The purpose of this provision is to protect the members of the legislature as well as the public against fraud from deceitful and misleading titles. (*Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *Abell vs. Clark*, 84 Cal. 226, 24 Pac. 383; *Matter of Bonds of South San Joaquin I. Dist.*, 161 Cal. 345, 119 Pac. 198; *Matter of Maginnis*, 162 Cal. 200, 121 Pac. 723.)"

If the act under review had proposed *only to amend* certain sections of the Political Code, then we concede that such amendments would be a re-enactment of the said sections, and we could look to the sections themselves for a statement of the purposes of the act. (*University of California vs. Bernard*, 57 Cal. 612.)

It must be observed, however, that the instant act proposes to enact an entirely new chapter to the Political Code (chapter IX) which shall contain eighteen *new* sections dealing with new subject matter. The subject matter of the act as set forth in its title is "the levy and collection of poll taxes".

We concede that so far as the act embraces within its provisions subject matter necessarily germane to the general aims and objects of the act, all such subject matter need not be catalogued in the title of the act.

"It seems to be well settled that it is not necessary that the title of an

act should embrace an abstract or catalogue of its contents." (*Abell vs. Clark*, 84 Cal. 229, and cases cited; *Matter of Bonds of South San Joaquin Irrigation District*, 161 Cal. 344.)

We call particular attention, however, to the fact that the instant act contains five separate proposed sections to the Political Code which are concerned exclusively with an elaborate machinery for registration of aliens and in which the subject matter of taxation is not even mentioned. For example, proposed sections 3841, 3842, 3843, 3844 and 3845 are separate and distinct sections, devoted to the subject matter of registration. It is possible that these sections might stand alone as presenting a legislative plan to secure the registration of aliens for another and different purpose than the paying of a poll tax. And yet the title of the act says nothing whatever about either registration or penalties in connection therewith. In other words, we are raising the point directly *whether an act may create separate and distinct new sections of the Political Code, dealing with a separate and distinct subject matter, which is not mentioned or referred to in the title of the act.*

If it be answered that registration is germane to the levy and collection of a poll tax as part of the machinery thereof, then we might argue that a hundred other sections of the Political Code *might* be so considered and yet any act, the title of which made no reference to the subject matter of said sections, would be objectionable. In short, this case presents the problem of determining just what is the limit to which we can go, under the constitutional limitation, in making a title the "be-all and catch-all" for any legislation which may be dumped into a common basket large enough to contain all legislative whims and fancies. It would appear that either the subject matter of registration of aliens was of sufficient importance to be worthy of a separate legislative act, or at least worthy of mere mention in a general way in the title of such an act. The addition of a very few words to the title would have made it sufficiently comprehensive to have included the omitted subject matter as follows: "and providing for the registration of aliens and penalties in connection therewith". If it be argued that the sections covering registration deal with matters which are merely incidental to the main subject of poll tax, and that therefore the title is sufficiently comprehensive under the constitution, then it might be just as easily argued that a new section of the Political Code, dealing with the subject of a tax collector's salary, could be created without the slightest reference to it in the title of the act, because the office of tax collector is incidental to the levy and collection of a poll tax. Furthermore, the levy and collection of a poll tax is no new thing in California, and when that legislation existed before there was no registration as a part of it. We are at a loss to understand the function of the constitutional section as a protection of the "public against fraud from deceitful and misleading titles", if a title dealing with poll taxes can include new sections of the Political Code dealing with registration and misdemeanors and the punishment thereof.

We submit, therefore, that under the broad principle of the decision in *Lewis vs. Durne*, 134 Cal. 291 (Oct. 10, 1901), at least that portion of the instant act which deals with registration is void. Registration is not a necessary part of the "subject to which the act applies" as tested by the principles laid down in the case of *Deyoe vs. Superior Court*, 140 Cal. 488, 489.

CONCLUSION.

We conclude, therefore, that whether we consider the Alien Poll Tax Act, so called, as inapplicable to Japanese aliens because of the treaty with Japan, or invalid under the Fourteenth Amendment to the Constitution of the United States, or unconstitutional under the California constitution so far as registration is concerned—upon any one or all of these grounds petitioner is illegally restrained of his liberty and should be discharged forthwith.

Dated, San Francisco, July 28, 1921.

Respectfully submitted,
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GUY C. CALDEN,
Attorneys for Petitioner.

ALIEN POLL TAX LAW OF THE STATE OF CALIFORNIA.

ENACTED BY THE LEGISLATURE OF 1921.

An act to add a new chapter to title nine of part three of the Political Code, to be numbered chapter nine thereof, embracing sections three thousand eight hundred thirty-nine to three thousand eight hundred fifty-six, both inclusive, providing for the levy and collection of poll taxes pursuant to the provisions of section twelve of article thirteen of the state constitution as adopted November 2, 1920.

The people of the State of California do enact as follows:

Section 1. The Political Code is hereby amended by adding a new chapter to title nine of part three thereof, to be numbered chapter nine, embracing sections three thousand eight hundred thirty-nine to three thousand eight hundred fifty-five, and to read as follows:

CHAPTER IX.

3839. Every alien male inhabitant of this state over twenty-one years of age and under sixty years of age, except paupers, idiots and insane persons, must annually pay a poll tax of ten dollars, as hereinafter provided. In the year one thousand nine hundred twenty-one A. D. such poll tax shall become due and payable on the first day of August and shall become delinquent if not paid on or prior to the thirty-first day of December of said year, whereupon there shall be added thereto a penalty of fifty per cent for such delinquency. In all succeeding years such poll tax shall become due and payable on the first Monday in March and shall become delinquent if not paid on or prior to the thirty-first day of July next ensuing, whereupon there shall be added thereto a penalty of fifty per cent for such delinquency. In the event such poll tax and penalty be not paid on or prior to the thirty-first day of December of the year in which levied, the whole amount thereof, tax and penalty, shall thereafter bear interest at the rate of seven per cent per annum, payable annually in advance on the first day of January for the ensuing year and no remission thereof shall be made for any part of the year during which such delinquent tax, penalty and accrued interest may be collected.

3840. It shall be the duty of every person liable to pay such poll tax to register, annually, as hereinafter provided, in the county, or city and county, wherein he may reside; provided, that if he be employed and temporarily domiciled in a different county during the time prescribed for registration he may register in the county of his employment. In conjunction

with such registration, such aliens shall in all cases give, under oath, the following data:

1. Name in full.
2. Place of nativity, naming country, and province or state, city or town where born.
3. Age.
4. Height.
5. Weight.
6. Color of eyes and hair.
7. Visible marks or scars.
8. Place of residence, giving, in cities, name and number of street, including number of room if in a hotel or lodging house; in rural districts the name, distance and direction of the nearest town, and name of school district.
9. Place of business or employment, giving exact location as before, and, if permanently employed, the name, address and business occupation of his employer.
10. Length of time in California.
11. Has application for naturalization been made?
12. If so, when and in what court?
13. Number and ages of minor sons, if any, residing in California.
14. Place or places of residence of such minor sons, if not residing with the person registered.

In the year one thousand nine hundred twenty-one A. D. the registration of persons liable to such poll tax shall begin ten days after the taking effect of this act and shall be completed on or before the thirty-first day of July. In all subsequent years such registration shall begin on the first business day following the first day of January and shall be completed on or before the Saturday preceding the first Monday in March of such year.

3841. Subject to the provisions of this chapter, such registration shall be conducted under the direction and control of the county clerk, or registrar of voters, in each county, or city and county. Except as otherwise provided therein, each school district within the county, or city and county, shall constitute a territorial unit for the purpose of such registration and each alien subject to the payment of such poll tax shall be required to register within the school district wherein he resides, or wherein he may be employed and temporarily domiciled during the period of registration; provided, however, that in school districts composed of cities, or cities and counties, which comprise two or more assembly districts contained wholly or in part within the territorial limits of such city, or city and county, each such alien residing or employed and temporarily domiciled within such city, or city and county, may be required to register within the assembly district wherein he may reside or be so domiciled, and it shall be the duty of the county clerk, or registrar of voters, to keep an accurate record of the aliens so registered in each of such assembly districts.

In addition to the number of deputies and clerks now allowed by law, each county clerk, or registrar of voters, is hereby authorized and empowered to appoint such number of temporary registration clerks as he may deem necessary to complete the registration of such aliens within the time limited by the provisions of section three thousand eight hundred forty hereof, and it shall be the duty of each county clerk, or registrar of voters, to appoint at least one such temporary registration clerk within each school district in the county. Before entering upon the duties of such employment, each of such temporary registration clerks shall file in the office of

the county clerk, or registrar of voters, his written oath faithfully to perform the duties of such employment. Each of such temporary registration clerks is hereby authorized and empowered to administer oaths to each alien by him registered and to attest with his signature the affidavit required by the provisions of section three thousand eight hundred forty hereof. Each of such temporary registration clerks shall receive, in full compensation for all services by him rendered hereunder, a fee of ten cents for each alien so registered, which he shall be entitled to keep for his own sole use and benefit, and the payment of such fee shall not be held, deemed or construed to be an increase in the compensation of the county clerk or registrar of voters by whom he was appointed, and no county clerk or registrar of voters shall be required to pay any part of any such fee into the treasury of the county, anything in any statute to the contrary notwithstanding; provided, that no person who is regularly employed and paid a salary by the county shall be eligible for appointment as such temporary registration clerk, and provided, further, that no fees shall be charged or collected for the registration of any alien who may register at the office of the county clerk, or registrar of voters, in any county, or city and county, of this state. The provisions hereof shall not be deemed to prohibit the appointment of school trustees or of school teachers as such temporary registration clerks. The fees hereby allowed to such temporary registration clerks shall be a charge upon and shall be payable from the unapportioned county school fund of the county, or city and county, wherein the service is rendered, and shall become due and payable immediately upon the close of the period of registration in each year; provided, no payment shall be made to any such temporary registration clerk until the county clerk, or registrar of voters, and the assessor of such county, or city and county, shall each certify, in writing, to the auditor thereof that such temporary registration clerk has delivered to the county clerk or registrar of voters all original affidavits of registration subscribed and sworn to before him and the duplicates thereof to the assessor; provided, further, that the auditor shall certify to the superintendent of schools of the county the amounts of such claims and in whose favor. The superintendent of schools of the county shall draw a requisition on the auditor in favor of the claimants against the unapportioned county school fund, the auditor shall draw his warrant against such fund and the treasurer shall pay the same.

The registration of each such alien shall be made in duplicate. The affidavit of registration marked "original" shall be returned to and filed with the county clerk, or registrar of voters; the one marked "duplicate" shall be returned to and filed with the assessor of the county, or city and county. All such affidavits must, in every case, be so returned and filed within three days following the close of the period of registration. The foregoing provision is mandatory and not directory. Every temporary registration clerk who shall fail, neglect, or refuse so to return and file such affidavits shall be subject to a penalty of ten dollars per day for each and every day in excess of three days following the close of registration during which such affidavits are not returned and filed as herein provided, such penalty, in every case, to be deducted from the compensation which would otherwise be due and payable to such temporary registration clerk, unless the penalty be greater than the sum earned, in which event the excess penalty shall be remitted, and the delinquent temporary registration clerk shall receive no compensation.

All aliens required to register by the provisions of this chapter who are able to write their names in English script must so sign the affidavits of

registration, in duplicate. Those who cannot write English script shall sign such affidavits in the script or characters of their native language, and the person by whom such alien is registered shall write the English equivalent immediately below such signature. If such alien be unable to write he shall be required to make an imprint of the ball of his right thumb in the space provided for his signature, after pressing his thumb upon a pad lightly saturated with fast black ink to be supplied for that purpose to each temporary registration clerk by the county clerk, or registrar of voters, by whom he was appointed. If the right thumb of such alien be missing, the left thumb may be so impressed, and a notation of such fact shall be made upon the affidavit of registration, at the time, by the person attesting the same.

Each person by whom any such alien is registered shall, at the time of registration, issue to such alien a certificate of registration, which shall be printed upon strong, durable paper, showing the county and date of registration, the name of the person by whom registered, the apparent age, the occupation, and the nativity, height, weight, and color of eyes and hair of the person registered. Such certificate shall also contain an appropriate space for the signature of the person registered, who shall be required to sign such certificate in the same manner that his affidavit of registration is signed and in the presence of the person by whom he was registered. It shall be the duty of each alien so registered to keep such certificate of registration in his immediate personal possession at all times and to exhibit the same, upon demand, to any assessor, deputy assessor or peace officer within this state, whether within the county of registration or not. Any inability, failure or refusal so to exhibit such certificate of registration for inspection after the period of registration is closed for the current year shall be *prima facie* evidence of the failure of such alien to register as herein provided and shall be sufficient cause for the immediate arrest, without warrant, and the detention of such alien, provided, that any alien who may enter the state to reside or to procure employment after the period of registration is closed must register in the office of the county clerk or registrar of voters of some county, or city and county, in this state within three days after entering the state; and provided, further, that any such alien who may so enter the state subsequent to the thirty-first day of July in any year shall be required to pay only the poll tax herein prescribed, without the penalty for delinquency, for such year, such payment to be made at the time of registration. A notation of the remission of such penalty and the reason therefor shall be entered upon the records of such county clerk, or registrar of voters, and upon those of the assessor, auditor and treasurer of such county, or city and county.

The county clerk, or registrar of voters, and the assessor with whom such affidavits of registration are filed must examine the same without delay, and whenever it shall appear therefrom that any person registered within the county, or city and county, was temporarily employed and domiciled therein at the time of registration but resides in some other county, they shall, respectively, at once transmit to the county clerk, or registrar of voters, and to the assessor of such other county, or city and county, a true copy of the affidavit of registration of such person.

3842. Prior to the fifteenth day of July, A. D. one thousand nine hundred twenty-one, and prior to the fifteenth day of February annually thereafter, the treasurer of each county, or city and county, shall procure such number of ten dollar poll tax receipts as may be reasonably adequate to supply the requirements of his county, as determined by the county superintendent of schools, county assessor and county clerk of such county. Such receipts shall be bound together in books or pads of twenty-five each, and shall be

attached by a perforated line to a stub. Each receipt and the corresponding stub shall bear the same number. Prior to the fifteenth day of July, A. D. one thousand nine hundred twenty-two, and annually thereafter, the county treasurer shall similarly procure such number of fifteen dollar poll tax receipts as may be reasonably adequate to supply the requirements of his county, to be determined as aforesaid. All such poll tax receipts shall contain appropriate spaces for the insertion of the name, nativity, age, place of residence, or of employment, height, weight, color of hair and color of eyes of the person to whom issued, and shall be signed with ink or indelible pencil by the person issuing the same. The corresponding stub shall contain appropriate spaces wherein there shall be entered the name, occupation, place of residence or employment, age and nativity of the person to whom issued, and the name of the person by whom issued.

3843. The treasurer must, prior to the thirty-first day of July, A. D. one thousand nine hundred twenty-one, and prior to the third Monday in February annually thereafter, sign the ten dollar receipts and enter the number and aggregate amount thereof in a book to be kept by him for that purpose. He shall thereupon deliver all such receipts to the auditor and charge him therewith. Prior to the thirty-first day of July, A. D. one thousand nine hundred twenty-two, and annually thereafter, he shall similarly sign the fifteen dollar receipts, and enter in his records the number and aggregate amount thereof, as before. He shall thereupon deliver such receipts to the auditor and charge him with the number and amount thereof, as before.

3844. Upon the delivery of the foregoing receipts to him, the auditor shall, in each instance, sign the same and enter the number and aggregate amount thereof in a book to be kept by him for that purpose. He shall, thereafter, and at the times fixed by the provisions of this chapter, deliver them to the assessor, in their respective orders, and shall, in all cases, charge the assessor with the aggregate number and amount of all receipts so delivered to the latter.

3845. It shall be the duty of the assessor of each county, or city and county, in this state to collect the poll taxes and the penalties for delinquency and the interest imposed by the provisions of this chapter. To assist him in the performance of this duty, each assessor is hereby authorized and empowered to appoint in addition to the number allowed by law, in the years one thousand nine hundred twenty-one and one thousand nine hundred twenty-two A. D., one field deputy for every one thousand aliens residing within such county, or city and county, as shown by the returns of the United States census of one thousand nine hundred twenty, and thereafter one field deputy for every one thousand aliens from whom such poll taxes and penalties were collected within such county during the preceding calendar year; provided, however, that in the event the number of such aliens in any county, or city and county, shall exceed five thousand, but one additional field deputy for each two thousand of such number in excess of five thousand shall be appointed. Such additional field deputies shall serve not to exceed ninety working days in any year, and in no event shall their employment begin prior to the first Monday in March or continue later than the thirty-first day of July in any year subsequent to the year one thousand nine hundred twenty-one A. D.; provided, however, that whenever it shall appear that all aliens shown by the registration records to reside within the county, or city and county, or to be employed and temporarily domiciled therein, who are liable to the poll tax imposed by the provisions hereof have paid the same, the employment of such additional field deputies shall cease immediately; and provided further, that so soon after the first

day of August in the year one thousand nine hundred twenty-two A. D. and succeeding years as the assessor can ascertain from the records of known registrations and payments the number of such aliens registered within the county who have failed to pay such poll tax he shall have power and he is hereby authorized to appoint one additional field deputy for each five hundred of such delinquent aliens, to serve not to exceed thirty days, and in no event later than the first Monday in December next following. In the year one thousand nine hundred twenty-one A. D. the additional field deputies authorized by the provisions of this section shall not be appointed prior to the first day of August, nor shall their employment be continued later than the thirty-first day of December in such year.

The additional field deputies authorized by the provisions of this section shall be paid at the rate of six dollars per day for such time as they actually may be employed at the county seat or within the limits of any incorporated city or town. During such time as they may be employed in rural districts they shall be paid at the rate of seven dollars per day, but shall receive no allowance for mileage, meals, hotels or other traveling expenses of any kind, or for the rental or use of any automobile or other vehicle used in the performance of such duties.

Subject to the limitation that in no event shall the total cost of collecting such poll taxes, penalties and interest exceed twelve per centum of the amount collected, the compensation of all additional field deputies employed hereunder shall be paid, at the foregoing rates, out of the sums so collected, and the assessor is hereby authorized and directed to pay such compensation to such additional field deputies, monthly, at the same time the salaries of other county officers are paid. The aggregate of the sums so paid shall be deducted from the total collections of the preceding month, at each settlement with the auditor and treasurer provided for in sections three thousand eight hundred fifty and three thousand eight hundred fifty-one hereof, and the latter shall, respectively, credit the assessor with the amounts so paid, not, however, exceeding, in any event, twelve per centum of the gross collections.

Nothing in this section contained shall be held, deemed or construed to increase the salary or compensation of any assessor now holding office in any county, or city and county, of this state, it being hereby declared that the foregoing authorization for the employment and compensation of such additional field deputies is directly due to the adoption of the amendment adding section thirteen to article twelve of the constitution of this state, whereby there are imposed upon such assessors new and exacting duties which were not foreseen or provided for at the time of their election or appointment, and for the proper discharge of which their respective existing forces of deputies, clerks and assistants are hereby determined and declared to be insufficient.

3846. The assessor must demand the payment of the foregoing poll taxes, penalties and interest from every person liable therefor, and upon the failure, neglect or refusal of such person to pay the same, he must collect the amount thereof by the seizure and sale of any personal property owned by such person. Such sale may be made after three hours' verbal notice of the time and place thereof, and the provisions of sections three thousand seven hundred ninety-one, three thousand seven hundred ninety-three, three thousand seven hundred ninety-four, three thousand seven hundred ninety-five, and three thousand seven hundred ninety-six of this code shall apply to all such seizures and sales.

3847. In the event any person subject to the poll tax hereby levied shall •

fail, neglect, or refuse to pay the same prior to the date fixed for the delinquency thereof, the happening of such delinquency shall, *ipso facto*, render all debts owing to such delinquent, including wages due or to become due for personal service, subject to garnishment and seizure in payment of such taxes and penalties, together with any interest which may have accrued thereon.

Immediately following the thirty-first day of December in the year one thousand nine hundred twenty-one A. D. and the thirty-first day of July in all succeeding years the assessor must examine the duplicate affidavits of registration on file in his office and ascertain therefrom the identity, business occupation and address of the employer, if any, of each person registered in the county, or city and county, who has failed, neglected or refused to pay such poll tax. He shall thereupon cause to be served upon each such employer, or upon the local agent or representative of such employer, if the employer be a non-resident of the county, or the city and county, a written notice of such delinquency, together with a demand that such employer withhold from any moneys in his possession, then due or thereafter to become due to such delinquent alien, whether for personal services or otherwise, a sum sufficient to pay in full all such delinquent tax and penalties, together with any interest which may have accrued thereon, and a further demand that the amount so withheld be delivered to the assessor in payment of such tax, penalty and interest, if any. Such notice shall state the name, age, nativity and particular place of employment of such delinquent alien, and the amount of the tax, penalties, and interest, if any, due.

Upon receipt of such notice it shall be the duty of every employer to withhold from any moneys then due or which may thereafter become due to such employee a sum sufficient to pay such delinquent tax and penalties in full, with the interest thereon, if any, and to pay the amount so withheld to the assessor, taking therefor a receipt, in the name of such employee, for the amount so paid, which he shall deliver to the delinquent employee, in lieu of an equal amount of cash at the time of his next payment of wages to such employee; provided, that before any employer so pays to the assessor any wages due to an employee he shall notify the employee of his intent so to do and afford the latter a reasonable opportunity, not exceeding three days, to produce a receipt for the tax alleged to be delinquent; and provided further, that such notice need not be given if the employee deserts his employment or secretes himself to avoid such notice.

The assessor may serve a similar notice and demand upon any debtor of any person liable to pay such poll tax and penalty, and it shall be the duty of the debtor so served to withhold from his creditor the amount specified in such notice and demand, and to pay the amount so withheld to the assessor; provided, such creditor be first notified of such intent and afforded a reasonable opportunity to produce a receipt for the tax alleged to be delinquent. Any debtor so paying any tax, penalty or interest for another shall take from the assessor a receipt therefor, in the name of the person liable, and may deliver such receipt to such creditor in lieu of an equal amount of cash.

In all cases wherein such delinquent alien may be performing work under any contract, whereby his wages are paid by any contractor or subcontractor, and not by the person for whom, or upon whose property, such work is done, the contractor, or subcontractor, by whom such wages are paid shall be held and deemed to be the employer of such delinquent alien

for the purposes of this chapter, and such notice shall be served upon the contractor, or subcontractor, and not upon the person for whom, or upon whose property, such work is being done.

3848. The receipt is the only evidence of the payment of such poll taxes. It shall be the duty of every person to whom such receipt is issued to retain the same in his immediate personal possession at all times, and to exhibit the same, upon demand, to any assessor, deputy assessor or peace officer in this state. It shall also be the duty of any such person to exhibit to his employer or to his creditor at the request of either, the receipt for any poll tax or penalty which has been actually paid which is alleged to be unpaid by the terms of any notice served by the assessor upon such employer or creditor as provided herein, and any person who fails so to exhibit any such receipt, within three days after such request, shall have no recourse against such employer or creditor for any money paid by either to the assessor by whom such notice was served.

3849. On or before the third Monday of October in each year subsequent to the year one thousand nine hundred twenty-one A. D., the assessor shall certify to the tax collector the name of every person appearing upon the current assessment roll of the county who, being liable thereto, has failed, neglected or refused to pay any poll tax or penalty, imposed by the provisions of this chapter, whereupon it shall be the duty of the tax collector to note the fact of such delinquency upon his rolls and to collect all such taxes and penalties at the same time with the first installment of the taxes assessed against any property of such delinquent for the current year. The assessor shall deliver to the tax collector such number of fifteen dollar poll tax receipts as may be necessary to enable the tax collector to issue proper receipts for the poll taxes and penalties collected by him. The latter shall give his receipt therefor, in duplicate, to the assessor, who shall deliver one of such receipts to the auditor, who, in turn, shall charge the tax collector with the aggregate amount of the poll tax receipts so delivered to him.

3850. On the first Monday in each month the assessor must make oath, before the auditor, of the total amount of poll taxes and penalties thereon collected by him during the last preceding month, and must, at the same time, settle with the auditor for the same, and pay to the county treasurer the total amount of such poll taxes and penalties so collected, less the deduction authorized by section three thousand eight hundred forty-five thereof.

3851. On the first Monday in January, A. D. one thousand nine hundred twenty-two, and thereafter on the first Monday in August of each year, commencing with August in the year one thousand nine hundred twenty-two A. D., the assessor must return to the auditor all ten dollar poll tax receipts received by him and not used. He shall, at the same time, pay to the treasurer the total amount collected and not previously paid in, less the deduction authorized by section three thousand eight hundred forty-four hereof. The auditor shall thereupon deliver to the assessor the fifteen dollar poll tax receipts. On the last Monday in December in each year subsequent to one thousand nine hundred twenty-one A. D., the assessor must return to the auditor all of such fifteen dollar poll tax receipts received by him and not used and must make settlement with the auditor and treasurer therefor. The auditor must, so soon as the settlement is made, return to the treasurer the receipts not used. The treasurer must credit the auditor with the receipts so returned, and must thereupon seal them up securely and deposit and keep them in his office.

3852. Whenever the name of a person not liable for poll tax is er-

roneously entered upon said poll tax roll, or whenever the assessor has failed to note the payment of poll tax lawfully assessed, if paid, the board of supervisors may, upon proof thereof, order the necessary correction to be made on the poll tax roll and the assessment roll whereon the same may appear.

3853. The proceeds of all poll taxes, penalties, and interest collected under the provisions of this chapter, less only the deductions authorized by section three thousand eight hundred forty-five hereof, shall be paid into the unapportioned county school fund of the county, or city and county, wherein the collection thereof occurred.

3854. The forms of registration, affidavits, certificates of registration, poll tax receipts, notices of garnishment and other forms or papers required by the provisions of this chapter shall be uniform throughout the state and shall be prepared by the attorney-general. All bills for printing such forms shall be a charge upon and shall be payable from the unapportioned county school fund of the county, or city and county, for which such work is done, and it shall be the duty of the county treasurer to file with the superintendent of schools of the county an approved bill in which he shall give an itemized cost of such printing. The superintendent shall draw a requisition on the auditor in favor of the claimants against the unapportioned county school fund, the auditor shall draw his warrant against such fund and the treasurer shall pay the same within fifteen days following the receipt of each completed order. The color of the paper upon which certificates of registration and poll tax receipts are printed shall be changed annually so that the same color shall not be employed in any two successive years and there shall also be a difference in the colors of the paper upon which there are printed the forms of poll tax receipts prepared to be issued prior to delinquency and those which are prepared to be issued subsequent to the date of delinquency in each year. The forms of affidavits of registration supplied to each county, or city and county, shall be consecutively numbered, in duplicate, commencing with the number one and continuing in sequence until all such forms provided for each county shall be numbered. Such forms, originals and duplicate shall be bound in books or pads of twenty-five each. The certificates of registration, with their corresponding stubs, shall be consecutively numbered and bound in like manner. The numbering shall begin anew with each new registration.

3855. Every person subject to the payment of the poll tax hereby imposed who shall:

1. Fail, neglect or refuse to register as herein provided; or
2. Falsely state his age to be under twenty-one years or over sixty years for the purpose of evading such tax; or
3. Give or lend to another any certificate of registration or poll tax receipt issued to him hereunder; shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished in the manner provided by law.

3856. In the event it shall be determined by the final judgment of any court of competent jurisdiction that any tax, penalty or interest collected under the provisions of this chapter was wrongfully collected and that the person from whom such tax, penalty, or interest was collected is entitled to receive restitution of the amount thereof, such judgment shall direct that such restitution be made from the school fund of the county into which such tax, penalty, or interest was paid. Upon receipt of a certified copy of such judgment it shall be the duty of the superintendent of schools of the county to draw his requisition on the auditor in favor of the claimants against the unapportioned county school fund, and of the auditor to draw

his warrant upon such fund for the amount thereof, and the treasurer shall pay the same. No public officer shall be held personally liable for the proper performance of any official duty imposed upon him by the provisions of this chapter.

Section 2. This act being an act providing for a tax levy within the meaning of section one of article four of the constitution shall take effect immediately.

2. ORAL ARGUMENT OF ATTORNEY-GENERAL U. S. WEBB.

If the court please. If I should take the suggestion of the court, as to the effect of the Japanese treaty, as an indication that the court has already determined that the provision of the treaty is to be construed as petitioner contends, I must admit that I would approach the discussion of this case with some reluctance and with some very grave fear as to the outcome. I do not so construe the suggestion of the court.

The Chief Justice. Our inclination was that way. We regard the point *prima facie* as good. We are ready to listen to you on the proposition and hear any argument.

Mr. Webb. To use a common expression, it has been my fortune, good or bad, on a number of occasions to go up against some very hard conditions, but I never voluntarily seek the opportunity to go up against them. Nevertheless and notwithstanding the suggested impression of the court, permit me, with all deference, to say that there is yet in this question sufficient to warrant this court in giving it most careful and earnest consideration.

The Chief Justice. That is what we are here for.

Mr. Webb. And I have no doubt but that this court can readily be convinced, or will readily see, that its preconceived ideas are incorrect, if in truth they be incorrect. Nor do I fear that the sweeping language of that treaty provision will in any way drive this court from the tremendous principles involved in its consideration. The question, if the court please, is far larger than the puny interests of the state from a financial standpoint, or the regulation or listing of the alien inhabitants of this state. The act provides for the listing, registration, the ascertainment of the alien inhabitants of this state, which is indeed important. The question before your Honors now involves the same question which for over the first half century of our national existence divided the states of the Union into a North and a South. The question is the same question that led the armies to the field of battle. But the termination of that war, Lee's surrender, was not a determination of the question or of all the questions involved. That, indeed, was but the battlefield adjudication, that there was not reserved to the states which had entered into the constitutional compact the power voluntarily to withdraw from that compact. No other question was there settled. Here and now is involved the question for the answer of this court, whether there is sufficient of sovereignty left resting in the states to enable them to continue to function as a government or political entity; whether there is sufficient of sovereignty left under the reserved powers of the state, or non-granted powers I prefer to call them, to enable the states of this Union to continue to conduct in fact and in deed a government within the Federal Government. A hundred years and more of centralization has been going forward. There has been a constant encroachment upon the rights and powers and functions of the state by those who were in favor of a higher or closer or more strict centralization of government. This has been evident in the executive, legislative and judicial departments of the National Government, and I may

say, without disrespect, that not always have the states and the courts stood firm against this encroachment. If we take, then, the provision in the treaty with the Empire of Japan, executed in 1911, which, by the way, in this respect, was the same as the treaty of 1894, as conclusive upon this question, and conclude from that fact that there is left to the state no power upon the matters provided for in this treaty, then we acquiesce in the theory of those who believe in a centralized government, and say that there rests in the President of the United States and two-thirds of the Senate the power and the ability, and often the disposition, to eliminate the element of sovereignty from the entity called the state.

But not forgetting the host of decisions, applicable and inapplicable, which counsel referred to this morning, and not omitting the thought of the elocutionary effect with which some of them were read, I think it well to go back to some of the decisions of this court. The question here now, in its larger aspects, has been before this court on former occasions. The particular set of facts around which this question groups itself has not heretofore been before the court. But other cases and other sets of facts involving, if you please, a construction of a statute of this state and of a treaty, applicable to one or the other of the contending parties, has been before this court, and the court has expressed somewhat differing views at different times, and in order that we may start with what I conceive to be a sound and really an American declaration of principle, I purpose to read from the first case in which this question reached this court, and that is one that is familiar to your Honors—*People vs. Naglee*, 1 Cal. 233. As I recall the statute there involved, it was one imposing a license upon Chinese miners, or a tax upon Chinese miners, and it was contended that that tax was not collectible, that it was void, because in violation of a treaty provision, and I will say that the facts—the case being limited to Chinese alone and concerning an occupation—under the suggestion this morning we would be far more seriously alarmed if the facts in this case were the same as in that case. The court passed, after reviewing the facts, to a discussion—

Mr. Justice Shurtleff. Who wrote the opinion, General Webb?

Mr. Webb. Justice Bennett.

Mr. Elliot. Judge Field dissented in that case.

Mr. Webb. No. Judge Field was not functioning at that time. On the contrary, Justice Field, in 20 Cal., expressly referred to this case and approved it in a dissenting opinion in the Chinese case on which you relied this morning.

Mr. Elliot. In which he was alone.

Mr. Webb. That is very frequently the case, that one who dissents in a court where there are three judges is alone. That case was limited to Chinese. This was all foreigners. Reading from page 245:

"The only question, then, under this treaty is whether the act of the legislature falls within the scope of the powers of a sovereign nation, and at the same time is not included in the category of powers granted by the states to the General Government, for if it falls within the former, and is excluded from the latter, then it is one of the laws which the treaty itself makes obligatory upon British subjects. But we have seen that the power of taxation, and the power of prescribing the conditions upon which aliens shall be permitted to reside in a state, are attributes of a sovereign nation, which have not, except in certain specified cases, of which the present is not one, been given up to the Federal Government. Our statute, then, is one of the laws or statutes, to which the treaty, by its own terms, provides

that the subjects of Great Britain shall be subject. Chief Justice Taney in speaking of this treaty in *Norris vs. The City of Boston* and *Smith vs. Turner*, 7 How. 472, uses the following language: 'The permission there mutually given to reside and hire houses and warehouses and to trade and traffic, is in express terms made subject to the laws of the two countries respectively. Now the privileges here given within the several states are all regulated by state laws, and the reference to the laws of this country necessarily applies to them, and subjects the foreigner to their decision and control.' The act, then, is not repugnant to that treaty. But even if the provisions of the statute did clash with the stipulations of that or of any other treaty, the conclusion is not deductible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had given up that power to the General Government. If the state retains the power, then the President and Senate cannot take it away by treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the Constitution. To hold any other doctrine than this would, if carried out into its ultimate consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation."

I call the court's particular attention to that doctrine of the supremacy of a treaty. We know the constitutional provision is that the Constitution, the laws made in pursuance of it, and treaties made under the authority of the United States, shall be the supreme law of the land. But, as pointed out here, the weight of authority is that a treaty is subject to constitutional provisions as fully and as completely as are acts of Congress.

There is a school, and I fear our friend on the other side belongs to it, that holds that a treaty, or that to the treaty-making power of the United States there is no bound, no limit, that because of the language used under the authority of the United States, and because of the other section, that the power to make treaties vests in the United States, leaves the treaty-making power unfettered and uncontrolled. And some of the text writers have announced that conclusion. But the trend of judicial authority today is that the treaty-making power is a power granted to the Federal Government pursuant to constitutional limitation, and is to be exercised under the provisions of the Constitution, and if the treaty be exercised upon a subject that is not found within the powers granted by the states to the Federal Government, then the provisions of the treaty upon that subject are void.

Mr. Justice Wilbur. Have you any decision of any court holding that, of recent years, the question whether or not the particular act of the treaty-making power of the Federal Government might be one that would have to be determined by the treaty-making power itself and not by the courts?

Mr. Webb. I think not. There is nothing in the Constitution which would warrant the thought that the validity of a treaty, as well as the validity of an act of Congress, is not to be determined by the judicial authority of the country.

Mr. Justice Wilbur. I am not expressing an opinion on that, but wanted

to know if you had any authority on that question. You spoke as if you had.

Mr. Webb. The sole power to determine the validity of any law rests with the judiciary. I think there can be no question of that, and a treaty is declared to be a law of the land. I have given no special thought to that question, but I will risk the assertion that the validity of a treaty is to be determined in the same way that the validity of any other law is to be determined, and, in truth, the courts have assumed from the beginning the power to so determine, and have laid down the rule as to the construction of a treaty.

The Chief Justice. There is no question about the construction of a treaty. Suppose the treaty did attempt to exempt all the subjects of that particular nation from any taxation, we will say.

Mr. Webb. Under one school of thought, and one of the text writers, at least, that treaty would be effective.

The Chief Justice. There is much force, of course, in the contention that a treaty might be held invalid if it was beyond the scope of the treaty-making power.

Mr. Justice Shaw. Suppose it should undertake to provide for the relation between parent and child with respect to its own people, there would be a serious doubt if it had any effect.

Mr. Webb. If it had no force it would be because it was a treaty covering a subject that was not within the powers granted to the Federal Government.

The Chief Justice. The other argument you made, that it is for the treaty-making power to determine that it was granted the right to make the treaty by the President and Senate, and the people of the United States having confided to them the treaty-making power, the scope of making the treaty—

Mr. Justice Shaw. I cannot recall any decision giving that power.

Mr. Webb. The decision in which the particular facts were contained is not obtainable upon either side, perhaps.

Mr. Justice Shaw. I am talking about the treaty relating to the conduct of citizens.

The Chief Justice. The question is whether the provision is discriminatory—whether the National Government has the right to provide that the treaty with a foreign nation can discriminate against its subjects. Is not that within the scope of the treaty-making power?

Mr. Webb. The National Government has the unquestioned power to enter into a treaty with Japan and include in it—

The Chief Justice. A provision against discriminating against its people in the matter of taxation.

Mr. Webb. I am not going with your Honors yet to that extent, nor will I go with your Honors to that extent.

The Chief Justice. That is the question here.

Mr. Webb. No. That is a part of the question only. The question here is: Has the Federal Government, acting through its President and two-thirds of the Senate, the power to deny to the state the right to deal with the inhabitants of that state?

Mr. Justice Wilbur. To discriminate against the inhabitants of the state?

Mr. Webb. And I will go further, and to do this with a general language not referring to the state?

Mr. Justice Shaw. The question whether under the Fourteenth Amendment it is discrimination, is one thing.

The Chief Justice. We are talking about the first proposition, whether it is within the scope of the treaty. Is it within the scope of the treaty-making power to provide that a state may not discriminate against its people?

Mr. Webb. I want, before that clause is read, to mention this rule: That a treaty must be construed as any other statute, and that it must be construed as to give to one claiming its benefits such benefits, if possible. No such rule of construction. The rule of construction is that it shall be so construed as to give effect, or a fair meaning, to all language used, and effectuate the intention of the parties, the high contracting parties, if it be possible to so construe it. But there is another rule of construction it seems to me that ought—

Mr. Justice Shaw. This treaty purports to say that no Japanese shall be taxed higher than anybody else. That is what it purports to do. The question is whether that is in the power of the treaty makers, is the question you are arguing. There is no doubt that is what it says.

Mr. Webb. I was proceeding to suggest a rule I think for which there is some sanity, under which even that language must be read.

Mr. Justice Shaw. Suppose you devote yourself to the proposition whether a treaty saying no other nation shall be taxed higher than our own citizens is constitutional. That is the only question in the case on that branch. If it is, that settles it.

Mr. Webb. If I could point this court to a decision of the Supreme Court of the United States, or this court, holding that this particular language did not mean what it said, or where this particular group of facts have come before the court, I would not be arguing this case. The exact authority is not in the books.

Mr. Justice Shaw. The meaning of this treaty is perfectly plain. Whatever it means, was it within the treaty-making power of the United States to make it?

Mr. Webb. I have suggested, regardless even of the meaning, whether it be within the treaty-making power to cover that subject.

Mr. Justice Shaw. Why not talk upon that question?

Mr. Webb. I am talking upon that question, but I cannot give my full thoughts in a single sentence on that subject. I may be so unfortunate as not to present my thoughts in the form in which you want them presented.

Mr. Justice Shaw. I am not criticizing your argument or the way you are presenting it. I am perfectly satisfied. The question of the meaning of this treaty is one thing—

Mr. Webb. I am coming to the meaning of this treaty, but I have a few ideas, perhaps they are bad, possibly they may be good, whether good or bad, I wanted to suggest them to this court, and one is a rule of construction that I thought ought to be applied to this language, in order to determine, first, whether—

The Chief Justice. Let us hear you upon it. What is the rule of construction?

Mr. Webb. I have been trying my best to make the statement.

The Chief Justice. What is it?

Mr. Webb. It is this: Unless the language of a treaty, from the words used, the language used, shows that it was the intention to deal with the powers of a state, it shall not be so construed as to affect the rights of a state.

Mr. Justice Shaw. And you want to add, that it shall be construed as limiting only the powers of the state.

Mr. Webb. And unless it will be held to have been intended to deal with the powers of the state, the United States on the one side and the other high contracting party on the other. That is what I have been trying to say, Mr. Justice Shaw.

Mr. Justice Shaw. You say it means that Congress cannot do these things and that California could not do it?

Mr. Webb. That is what I was going to say in the very next sentence, but you beat me to it. I ask you to read that language again, and to remember that the treaty starts with the contract between the high contracting parties, or, in plain English, between the United States of America on the one hand, and the Empire of Japan on the other, and it provides that neither of the high contracting parties shall impose upon the subjects of the other a tax or charge higher than is imposed by the other contracting party upon native citizens or subjects. If it be conceded that the particular charge under examination be one not within the control of the Federal Government, then any court would say that language meant only to bind the Governments, the entity on either side. I am not at all unconscious of the fact that some one has said, in dealing with other nations the United States stands forth as an entity, but in considering our internal circumstances we are forty-eight entities. But that has nothing to do with this situation. I repeat that the language used in the treaty shows an intention of the Government to bind itself and its Congress on the one hand. Now let us see. If it meant to bind each of the forty-eight states, and each of the cities and towns of the forty-eight states, to what interminable trouble are we led. Let us assume that each state in the Union adopt a law imposing a poll tax upon all inhabitants, and, notwithstanding the very learned citation from Professor Plehn relative to the poll tax, it is still alive and vigorous in some localities. Let us assume that each of the states had last year passed a poll tax, Maine, if you please, applicable to all the inhabitants of the state, irrespective of race, color, or previous condition of servitude—Maine imposing a poll tax of one dollar, and running on down through the list, and California imposing a tax of forty-eight dollars.

The Chief Justice. I do not think you are quite treating the point you started out to talk about. You were claiming, assuming this to apply to the state, and assuming it to be a prohibition on the state, was it within the scope of the treaty-making power?

Mr. Webb. I am going to leave it right there and go on with some other cases I have in the history of the decisions of this state, but I want the privilege of returning to that consideration when I return to the construction of that treaty. Continuing to read from the Naglee case: "If," says Chief Justice Taney, "the United States have the power, then any legislation by the state in conflict with a treaty or act of Congress would be void. And if the state possess it, then any act on the subject by the General Government, in conflict with the state law, would also be void, and this court bound to disregard it. And here let us remark that the questions which we have been examining are questions of power and not questions of justice, or policy, or expediency. We hold that the power of taxation over foreigners, as well as of determining the conditions on which they shall be permitted to enjoy the protection of the state in a particular place or occupation is, in the language of the Supreme Court of the United States, perfect and undiminished and indispensable, and that it can-

not be taken away or impaired by acts of Congress or treaties with foreign nations, and that the justice and expediency of tax and license laws must, so far as foreigners are concerned whilst residing within our territorial limits, be left to the discretion of the states respectively, to be exercised as the wisdom of their legislators shall dictate, subject only to such restrictions as may be imposed by the organic laws of the several states."

The Chief Justice. That would mean we could legislate with reference to Chinese and be held to be beyond the treaty-making power.

Mr. Webb. Our Chinese cases have been for the most part occupation cases. One is a fishing case, one a laundry case. The Truax case comes from Arizona, where the Arizona statute compelled them to employ a certain proportion of electors—was a discrimination of labor. They are distinguished from this case.

The Chief Justice. I thought they might come within that general language of Judge Bennett.

Mr. Webb. They might fall within that general language. I grant it. (A recess was here taken until 2 o'clock.)

AFTERNOON SESSION.

Mr. Webb. If the court please. At the moment of the noon intermission I had concluded reading from the opinion in the Naglee case, and had indicated that I wished to mention two or three other cases heretofore decided by this court in that connection. In reference, however, to the Naglee case, I suggested that if the law as announced by the court in that case was the law, then it is yet the law, that there has been no change in the Federal Constitution which would change the rule applied by this court in that case, nor has there been any change in the Federal Constitution since then which would make inapplicable the language used by the court to the facts in that case to the facts in this. But in the 5th California, but a few years following the decision in the Naglee case, this court had before it a case which involved a construction of a treaty of this country with Austria, I believe, with the particular portion of that treaty which purports to give to the subjects of Austria the right to inherit property in this state, and the court held that the treaty provision was controlling. The principles announced were in some respects quite opposed to and quite antagonistic to the principles announced in the Naglee case, though the Naglee case was not referred to in the decision. Chief Justice Murray did not participate in the decision in the Gerke case, and declined to express his views thereon, the other two justices determining the matter. In the 6th California, another case involving the construction of a treaty with some place—I do not know where and do not care—in which the right under the treaty was asserted. The facts involved in that case, not like the facts here at all, but involving the same principles of treaty construction, Chief Justice Murray, writing the opinion, referred to the Gerke case, disapproved of the conclusion reached by the court in that case in the 5th California, and used in the opinion the language to a large degree which I read to you this morning from the Naglee case, though not in terms referring to the Naglee case, announcing in most positive terms that the powers that had not been granted by the states to the General Government under the constitutional compact were reserved to the states as effectually against the treaty-making power as against the power of Congress. The language used is quite as forceful as that used by Justice Bennett, which I read this morning. The Lin Sing case, from which coun-

sel read this morning in 20th Cal., was decided by a majority court. That case involved perhaps one of the hardest statutes ever drawn in any state against a people, referring, I believe, to the Chinese only, levying a tax upon Chinese which indicated a purpose to prohibit Chinese immigration into this state, and levying a tax which increased two dollars per month for each month the payer of that tax should remain in California. A harsher statute you could not conceive. And the court, examining that statute and the treaty, held that the statute was invalid. Really the opinion went upon the proposition that the statute was intrinsically bad, but Justice Field dissented, and while I am aware that a dissenting opinion has not that controlling force upon this court that the prevailing opinion sometimes has, if it should be thought the dissenting opinion were better than the prevailing opinion, there is no law against this court adopting the logic and the reasoning of the dissenting opinion, and I want to read just a few lines from the dissenting opinion written by Justice Field:

"I concur, therefore, fully, in the opinion of Mr. Justice Bennett in *People vs. Naglee*, and I do not see how the court can hold the law under consideration to be in conflict with the Constitution of the United States, without overruling the decision in that case." I cite that to show that Justice Field, as late as 20 Cal., regarded the Naglee case as a well-considered, rightly determined, case, and that he approved the reasoning of the learned justice who wrote it, that it was not a stray or ill-considered opinion, but that, dissenting from the prevailing opinion, he adopted the Naglee case in 1st California as being the rule which he thought then should be followed. I am not unaware that this court in *Blythe vs. Hinckley*, in 127 Cal. I believe, Mr. Justice Henshaw writing the opinion, expressed it unqualifiedly as the doctrine that the right of descent and devolution of property was subject to treaty provisions, and in support of that statement cited the Gerke case in 5th Cal., to which I have referred, but did not cite the Naglee case in the 1st or the Siemssen case in the 6th. But I may say as to the Blythe case that the question which was discussed as to the part of the treaty was not involved in the case at all. What was said was purely dicta.

The Chief Justice. Is not that true of the decision in the 1st California? Mr. Webb. I do not think so.

The Chief Justice. Because in the first place they construed a treaty and found the treaty did not do that and said it did not make any difference.

Mr. Webb. It said a strict construction of the treaty would exclude the contention made under it, but the court went to the question argued and reached—

The Chief Justice. However, this is ultimately a question for the Supreme Court of the United States. It is a federal question. The decisions of the Supreme Court of the United States are more to the point.

The Attorney-General. I understand that, but it does seem to me when the power of a state to do that which seems necessary to maintain its entity as a government—when a state is imposing a tax, for it must be conceded that the power of taxation is the basic rock upon which governments are builded, and when such a question is before a state court to be determined relative to the powers of the state in which it is sitting, unless there are federal decisions which imperatively compel that court to decide against the power of the state, and if there be decisions of that court and federal courts which warrant a decision upholding the power of the state, that the latter ought to be the decision of the state court, and if the rights of the state are to be narrowed by new decisions, it is

better that they be narrowed by federal decisions. I realize that the construction of a treaty raises a federal question, and that this case, in one event at least, might go to the Supreme Court of the United States, and I think it well that it should go there, and certainly if the powers and prerogatives and sovereignty of the state are to be narrowed by a construction which would hold the language of the Japanese treaty as exempting or prohibiting them from paying any higher tax than any native citizen.

And now, with the court's permission, I want to return to the illustration and to the matter of construction of the language of that treaty, the illustration upon which I started this morning. I am impressed with the view that a proper construction, if you limit its language and apply it to the parties to the treaty, the Government of the United States on the one hand and the Empire of Japan on the other——

The Chief Justice. Is not the Government in making the treaty speaking for all the people of the United States?

Mr. Webb. That is sometimes said, but they have also said that a treaty must be construed as a statute or constitutional provision, that you must read its language and draw the intent and purpose from the language used. And now let us see where it leads us, and I want to repeat the illustration that I sought to give this morning, that if the several states should each adopt a poll tax law, beginning with Maine with a tax of one dollar per capita and ending with California with a tax of forty-eight dollars, if the Government, speaking in this treaty, disregarded its division into a sisterhood of states, and of the division of those states into local taxing municipalities, and if we say that it was guaranteed that nowhere in the United States, either by state or municipality, would a subject of Japan be subjected to a higher charge than a native citizen, then you must say that the Japanese residing in forty-seven states that imposed a higher poll tax than Maine could complain that the native citizens and subjects of the United States residing in Maine were subject to a charge of but one dollar, and that it was their right to have that one dollar tax imposed upon them, thus nullifying the enactment of forty-seven states. For if it refers to poll tax, it refers to property tax.

The Chief Justice. I do not think that is hardly true. I think the provision simply means a state must treat all persons within its limits the same; not going to lump the forty-eight states together for the purpose of taxation.

Mr. Webb. That is not the language of the treaty, and there is not a word in the treaty that justifies, it seems to me, that view. There is a classification for purposes of treaty enforcement that is nowhere permitted. The treaty must deal with the subjects of the two contracting parties as a whole, and I believe the illustration is quite worthy of the court's consideration. And, likewise, we may consider the differing rights upon localities as well. It was suggested this morning by the court that no one would claim that this was an exercise of police power, but I wish to suggest this situation: This statute provides for a complete registration of alien inhabitants of this state.

Mr. Justice Wilbur. The right to compel them to register might well be conceded.

Mr. Webb. It provides for a complete registration of alien inhabitants of this state over 21 and under 60 years of age, and likewise for the registration of the male children under 21 resident in this state. It does not provide for the registration of alien inhabitants over 60, or for the regis-

tration of female aliens at all. That is the complete requirement as to registration. It will not be disputed—I assume it will not be disputed—that it would be perfectly valid, irrespective of treaty, to provide for a registration of aliens by state enactment. It is worthy of consideration whether it is not also perfectly proper to provide a charge for such registration.

The Chief Justice. There is no doubt about that.

Mr. Webb. There is no pretense that it is set forth for that purpose. That undoubtedly would be susceptible of a pretty fair argument, except that the poll tax provision was adopted pursuant to the mandate, in behest of the constitution, which did not require the registration.

Mr. Justice Shaw. The act itself prohibits the registration of aliens who are not subject to poll tax.

Mr. Webb. Except male children of those registering. They do not register, but they are listed.

Mr. Justice Shaw. Male children do not have to register themselves?

Mr. Webb. No. But a list is given by the male parent of these children.

Mr. Justice Shaw. The charge is that this man, who was subject to poll tax, did not register?

Mr. Webb. That is all. It was claimed this morning that a treaty was the paramount law of the land. We never intended to question that. A valid treaty is a law of the land, and it requires no authority to convince the court or any of its members of that fact, because the Constitution itself makes the declaration. As to the Fourteenth Amendment, since the *Magoon* case, and for some time prior, the right to classify persons under the Fourteenth Amendment was affirmed by the federal court, and is as securely established as the right to classify in this case, as decided in *Pasadena vs. Stinson*. We admit the classification must be one made proper or suggested by some intrinsic or constitutional or natural difference. That is, there must be such a difference in the subjects classified as will suggest the propriety of the classes established, and that does not help the situation unless the legislation adopted is appropriate to the different classes as established. Or, in other words, there must be something to suggest different legislation as applied to the different classes. Those principles are so well established that we would not attempt to combat them. The classification of aliens from others, if there is any reason for differing law applicable to them, is certainly a classification justified under federal and state authority. That the different burdens, privileges and obligations of the citizens and the aliens suggest differing laws applicable to them, I think there can be no question. I do not believe that there is a serious question raised under the Fourteenth Amendment, and if I had been inclined to consider that the question raised under the treaty was not serious before coming into court, certainly the suggestions of the court this morning would have impressed me with some thought that the court might think them serious. This law or statute that is here challenged was adopted by the legislature of the state pursuant to the constitutional mandate. It is upon the statute book. The proper officers of the state are enforcing it. In it is involved a basic power of the state government. By the adoption of the Japanese treaty the state's hands have been tied in this regard. It plainly appears that the rights of the state are made dependent upon the will, not of Congress, not of the Congress and President, but upon the President and two-thirds of the Senate, and a decision to that effect will be that the essential elements of power necessary in a state government may by that portion of the Federal Government be stricken down.

I indicated at the beginning my thought that there is or ought to be affirmed some rights existing in the states. I believe the rights of the states still persist, and I believe it is unfortunate that encroachments should be encouraged. I believe the proper construction of this treaty will limit it to the taxes and charges imposed directly by federal authority, and that it should be held that if it had been the purpose of the treaty or the treaty-making power to tie the hands of the forty-eight states in this regard, that some language could be found in that treaty to indicate such purpose. There is no decision, state or federal, which compels this court, or which should impel this court, to hold this statute unconstitutional because it conflicts with the four-line provision of the Japanese treaty.

The Chief Justice. That suggestion that I made to the other side, what would be your view on that? Suppose the court is called upon to hold it is in conflict with the Japanese treaty, and therefore that it is also ineffective against nations having the most favored nation clause, what would be your view then as to the effectiveness of this provision against alien people who had no such clause? Would you consider it a valid law without regard to the Fourteenth Amendment? Of course, it was in the minds of the people that enacted that to impose it upon all aliens.

Mr. Webb. I think so, and I should answer in the affirmative, that it will be a valid law as against those who cannot invoke a treaty provision, for it is not the action of the state that accomplishes the exemptions. It is the action of the Federal Government in entering into the contract with the nations. And I might add that I believe there are but two other treaties that contain any language similar to the particular clause of the Japanese treaty referred to, and that those two are some lesser nations.

The Chief Justice. There are many with the most favored nation clause.

Mr. Webb. Yes. I do not believe that the favored nation clause will reach this subject. There is a case recently by Justice Holmes which dealt with the favored nation clause, *Sullivan vs. Kidd*, decided only a few weeks ago by the United States Supreme Court. I am not sure that I understand exactly what it means, and hence pass it to this court. It is in No. 6 Supreme Court Advance Opinions, 192.

In the migratory bird case that was referred to this morning, Justice Holmes also writing the opinion, while the opinion shows a strong and intended assertion of national power and of centralization, and even suggesting that it was within the power, not necessary to that opinion, but the bare assertion that it was within the power of the Federal Government to invade the state with regard to federal questions, admits that the treaty-making power has some limit, without specifying it; that it is not omnipotent, or that it is all wide; that there are some limitations and some powers reserved to the states. The decision in the migratory bird case, which is often referred to, decides no question of constitutional law, or law applicable to treaties, except that the treaty entered into between the United States and Great Britain upon the subject of migratory birds was a subject within the treaty-making power, and that the State of Missouri had not exclusive control over migratory birds. The decision was placed upon this ground: It was said by the writer of the opinion that the dominion of the state over its property, which counsel referred to as a new doctrine, and it is an old one, could not be questioned, but that migratory birds were not owned by the state. Said they were not in the state last week. They are in the state today and a thousand miles away tomorrow, that no property rights could be asserted in them, that they were indeed migratory, that the states were without power to regulate

the killing and taking of migratory birds, and hence that the power must be one which will fall to the nation, and its exercise in that particular was proper.

Mr. Elliot. We do not wish the court to get the notion that we are not urging the unconstitutionality of the act under the Fourteenth Amendment. It is necessary to the decision of the second case.

Mr. Justice Shaw. You do not waive anything by not contradicting it.

Mr. Elliot. Will you permit me to answer one question that has not been answered, and I think it is very vital?

The Chief Justice. Yes.

Mr. Elliot. The question was asked whether there are any limits to the treaty-making power. We have studied very hard to see if we could define in any way the longitude and latitude of that power, and the authorities and the most recent text books, and I have three or four here, seem to have determined that there is no limit upon the treaty-making power except the Constitution of the United States, and except, further, that no treaty can change the political form of the Government of the United States or of any state.

Mr. Justice Shaw. All you are concerned with is, does the treaty-making power cover this question?

Mr. Elliot. Yes.

Mr. Justice Shaw. We do not care how much it covers other than that.

Mr. Elliot. There is one question more I would like to answer. It was suggested by one of the justices as to whether or not this registration act could not be considered as somewhat indefinitely perhaps within the police powers, by reason of the fact that it did provide for the registration of aliens.

The Chief Justice. I think it must be conceded that the registration provided is purely an incident to the collection of the poll tax.

Mr. Elliot. Then in the case of the Mexican alien, which involves only the question of the Fourteenth Amendment, does the court wish us to file a written brief? We are perfectly serious in our attack under the Fourteenth Amendment, and after a study of it I am just as convinced that act is invalid under the Fourteenth Amendment as under the treaty. Mr. Thomas is attorney for the Mexican alien.

Mr. Thomas. I would like to file further authorities.

The Chief Justice. It is important that this matter be decided very soon in view of the fact that the act is being enforced by officers in various parts of the state. If you take time to file briefs it is going to delay the decisions. We have your general principles upon which you stand and all your authorities.

Mr. Elliot. We will submit it.

The Chief Justice. The matter stands submitted.

3. OPINION OF COURT.*

Crim. No. 2390. In Bank. September 12, 1921.

In the Matter of HEIKICH TERUI on *Habeas Corpus*.

[1] CONSTITUTIONAL LAW—PROTECTION OF CITIZENS AGAINST DISCRIMINATION IN TAXATION MATTERS—TREATY-MAKING POWER OF UNITED STATES.—The protection which should be afforded to the citizens of one country residing in another against discrimination in matters of taxation based solely on their alien citizenship is a proper subject of negotiation between the Government of the United States and the governments of other nations, and within the treaty-making power of the Federal Government.

[2] ALIEN POLL TAX LAW OF 1921—PROVISIONS OF TREATY BETWEEN UNITED STATES AND JAPAN—UNCONSTITUTIONALITY OF ACT.—In view of the provisions of the existing treaty between the United States and Japan to the effect that the citizens or subjects of said nations "shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects," etc., the Alien Poll Tax Law of 1921, providing for the levy and collection of an annual tax upon every male inhabitant of the state between certain ages, is ineffective for any purpose with relation to any citizen of Japan.

Application for a writ of *habeas corpus* prayed to be directed to the chief of police of the City of Oakland, to secure the release of petitioner held in custody for failure to register under the Alien Poll Tax Law. Petitioner discharged.

For Petitioner—Albert H. Elliot, Guy C. Calden.

For Respondent—U. S. Webb, attorney-general.

The petitioner, an alien male inhabitant of the State of California of the age of about thirty-five years and a subject of the Empire of Japan, is held in custody by the chief of police of the City of Oakland, upon a complaint charging him with having failed to register as required by the terms of an act of the legislature, entitled "An act to add a new chapter to title nine of part three of the Political Code, to be numbered chapter nine thereof, embracing sections three thousand eight hundred thirty-nine to three thousand eight hundred fifty-six, both inclusive, providing for the levy and collection of poll taxes pursuant to the provisions of section twelve of article thirteen of the state constitution as adopted November 3, 1920," enacted at the legislative session of 1921.

This act, commonly known as the Alien Poll Tax Law, provides that "every alien male inhabitant of this state over twenty-one years of age and under sixty years of age, except paupers, idiots and insane persons, must annually pay a poll tax of ten dollars, * * *." In the year 1921 this tax becomes due and payable on the first day of August, and delinquent if not paid on or prior to December 1. It contains provisions requiring "every person liable to pay such poll tax" to register as provided in the act, such registration in the year 1921 to be effected on or before July 31.

As is stated in the title to the act, it was enacted pursuant to the mandate of section 12 of article XIII of the constitution as amended under the initiative provisions of our constitution, at the general election of 1920. Prior to the amendment, this section of the constitution was as follows: "No poll tax or head tax for any purpose whatsoever shall be levied or collected in the State of California." By the amendment of 1920 it was made to read as follows: "The legislature shall provide for the levy of an annual poll tax, and the collection thereof by assessors, of not less than four dollars on every alien male inhabitant of this state over twenty-one and under sixty years of age, except paupers, idiots and insane persons. Said tax shall be paid into the county school fund in which county it is collected."

The legislation, both in the constitution and the act, is purely for revenue purposes, an exercise solely of the power of taxation, and contains nothing in the nature of an exercise of the police power of regulation, the provisions relative to registration being solely for the purpose of facilitating the collection of the tax from those liable therefor, and merely incidental to the matter of collecting the tax. It is indeed expressly declared in section 2 of the act that it is one "providing for a tax levy" and, therefore, that it "shall take effect immediately". It is provided in the act that "every person subject to the payment of the poll tax hereby imposed who shall, 1.

Fail, neglect or refuse to register as herein provided" shall be "guilty of a misdemeanor, and, upon conviction thereof, shall be punished in the manner provided by law". It should be noted that under our laws no poll tax or capitation tax, or its equivalent, is levied upon citizens of the state.

Petitioner seeks his discharge from custody, claiming that the complaint fails to state a public offense. His specific claims in this regard are, first, that the act is entirely ineffective as to all aliens who are subjects of the Empire of Japan in view of a provision in the existing treaty between this country and the Empire of Japan, proclaimed April 5, 1911, and, second, that the act is void as to all alien inhabitants of the state, in that it denies to persons within the jurisdiction of the state the equal protection of the laws, in violation of a provision of section 1 of article XIV, amendments to the Constitution of the United States.

As to the first claim, viz.: that the act is ineffective as to all aliens who are subjects of the Empire of Japan in view of a provision in the existing treaty between this country and the Empire of Japan, proclaimed April 5, 1911:

Article I, of this treaty, after providing that "the citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade," etc., "and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established," provides:

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

It is, of course, obvious that the Alien Poll Tax Law of California does, without any pretext whatever, require Japanese subjects, as well as all other aliens, to pay taxes both other and higher than those required to be paid by citizens of the United States. No poll tax or its equivalent is required to be paid by the latter, and the alien is liable equally with the citizen for all other kinds of taxes imposed, with the result that this poll tax is an additional tax imposed solely by virtue of his being an alien. It would seem also that the effect of such a tax would be that the alien is not allowed to enjoy, in respect to "the most constant protection and security for their persons and property", the "same rights and privileges as are or may be granted to native citizens * * *, on their submitting themselves to the conditions imposed upon the native citizens * * *." No one can fairly dispute that the act openly and avowedly discriminates against alien residents in the matter of taxation for revenue purposes.

It cannot be disputed at this stage in our history that if these provisions of the treaty were intended to be applicable in the several states of the United States, as well as in its other territorial possessions, and are within the proper scope of the treaty power of the United States, they render our alien poll tax absolutely ineffective as against alien residents who are Japanese citizens or subjects. Certain propositions with relation to treaties between the United States and other nations are now so thoroughly settled, in view of express constitutional provisions and the decisions thereunder,

that they are practically elementary law. While the Government of the United States is a government of delegated powers, the states retaining such powers as they have not delegated or surrendered to it, the people of the several states have surrendered the whole treaty-making power to the Federal Government, and vested it in the President and Senate of the United States (sec. 2, art. II, U. S. Const.), and have expressly excluded each state from all power in this regard (sec. 10, art. I, U. S. Const.). They have further expressly declared in the Federal Constitution as follows: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Sec. 2, art. VI.)

From the first decision of the Supreme Court of the United States upon this subject rendered in 1796 (*Ware vs. Hylton*, 3 Dall. 198), to the present day, it is uniformly declared, as the express language of the Federal Constitution unequivocally requires, that as to all matters within the treaty-making power conferred by the Federal Constitution, a treaty entered into on the part of the United States by the President with the concurrence of two-thirds of the United States Senate is a part of the supreme law of the land, binding on all states and to which all state enactments in conflict therewith must yield. (See *Geofroy vs. Riggs*, 133 U. S. 258, 266; *Hauenstein vs. Lynham*, 100 U. S. 483.) As was said in *Ware vs. Hylton*, *supra*: "It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the constitution and laws of any individual state, and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by a repeal or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole." As was said in *Hauenstein vs. Lynham*, *supra*, "it must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution". The learned attorney-general of course does not dispute these well-settled propositions.

It is suggested, however, that the subject here covered by the treaty, including as it does matters relative to the exercise of their sovereign power of taxation by the several states, is not within the proper scope of the treaty-making power conferred by the people in the Federal Constitution. It is to be noted at once that the treaty provisions in no degree purport to limit the several states in the matter of imposing or collecting taxes, except simply to require that in such matter there shall be no discrimination as against Japanese citizens residing therein, the express provision with regard to taxes being that neither American citizens residing in Japan nor Japanese citizens residing in America shall be compelled "to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects". This is simply a provision to prevent discrimination on the part of one against the subjects of the other residing in its territory, placing in so far as the kind and amount of taxes are concerned native citizens and the subjects of the other nation upon an equal footing.

It may at once be conceded for all the purposes of this case that there are matters without the proper scope of the treaty power of the United States, matters which could not fairly be held to be included in the grant of that power by the people of the several states to the Federal Government.

We are aware of no decision of the Supreme Court of the United States by which a treaty provision has been declared to be beyond the treaty power, but it may fairly be claimed that there are such matters. But that the treaty-making power includes such matters as are covered by the provisions here involved cannot be seriously questioned. The rule, as declared in *Geofroy vs. Riggs*, 135 U. S. 258, 266, by the Supreme Court of the United States, the ultimate authority on such a question, is that "the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations" and, with regard to such matters, is "in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its departments, and those arising from the nature of the Government itself and of that of the states". The court there said that it would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. The court then said: "But with those exceptions (i. e., those stated in portion last above quoted) it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country," citing cases including our own case of *The People vs. Gerke*, 5 Cal. 381. In *Geofroy vs. Riggs*, *supra*, it was held that it was clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiations and of regulation by mutual stipulations between the two countries. (See, also, in this connection *Hauenstein vs. Lynham*, 100 U. S. 483, 489, 490.) (1) It seems to us to be too clear to admit of argument that the protection which should be afforded to the citizens of one country residing in another against discrimination in matters of taxation based solely on their alien citizenship, is a proper subject of negotiation between our Government and the governments of other nations, and that there is nothing in the provisions under discussion that was beyond the treaty power of the United States.

We have assumed thus far, contrary to a suggestion of the learned attorney-general, that the provisions of the treaty here involved must be construed as applicable to the several states of the United States, as well as in its other territorial possessions. As to this there cannot be the slightest doubt. There is no word in the treaty to indicate an intention to make such an unreasonable limitation on its provisions relating to the rights of the citizens of one nation "in the territories of the other", and one so contrary to the whole intent and purpose of a treaty between sovereign nations. The word "territories" used in article I of the treaty was undoubtedly used as meaning the entire domain over which dominion was exercised by each of the sovereign nations, which, of course, in so far as the treaty-making power was concerned, included all of the states of the United States.

(2) There is no possible escape from the conclusion that, in view of the provisions of the existing treaty between the United States and Japan, the Alien Poll Tax Law is ineffective for any purpose with relation to any citizen of Japan. The complaint under which petitioner is held charges only a violation of this act. It therefore fails to state a public offense as against him.

In view of our conclusion on the matter discussed, it is unnecessary in this case to discuss the claim made under the Fourteenth Amendment to the Constitution of the United States.

It is ordered that the petitioner be discharged from custody.

ANGELLOTTI, C. J.

We concur:

SHAW, J.

LAWLOR, J.

WILBUR, J.

LENNON, J.

SHURTLEFF, J.

SLOANE, J.

Crim. No. 2394. In Bank. September 12, 1921.

In the Matter of GUILLERMO D. KOTTA on *Habeas Corpus*.

(1) ALIEN POLL TAX LAW OF 1921—INVALIDITY OF—VIOLATION OF SECTION 1 OF ARTICLE XIV, UNITED STATES CONSTITUTION.—The Alien Poll Tax Law of 1921, providing for the levy and collection of an annual tax upon every alien male inhabitant of the state between certain ages, is void as to all such alien inhabitants of the state, in that it denies to persons within the jurisdiction of the state the equal protection of the laws, in violation of the provisions of section 1 of the Fourteenth Amendment to the Federal Constitution that no state shall "deny to any person within its jurisdiction the equal protection of the laws".

(2) ID.—MEANING OF WORD "PERSON" AS USED IN SECTION 1 OF FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION.—The word "person" as used in section 1 of the Fourteenth Amendment to the Constitution of the United States includes aliens.

(3) ID.—DISCRIMINATORY TAX LAWS—DENIAL OF EQUAL PROTECTION OF THE LAWS.—Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated—that is, all those among whom no difference "which bears a reasonable and just relation" to the matter exists, exempting the remaining portion from the burden—are not "equal laws", and their enforcement would deprive the persons so burdened of the equal protection of the laws.

(4) ID.—TAX BASED ON ALIEN CHARACTER OF INHABITANTS—IMPROPER CLASSIFICATION.—An alien poll tax law which lays a tax upon the alien male inhabitants of the state and not upon its citizens, solely because of the alien character of the former, creates a distinction prohibited by the language of section 1 of the Fourteenth Amendment relative to equal protection of the laws.

Application for writ of *habeas corpus*, prayed to be directed to the chief of police of the City and County of San Francisco, to secure the release of petitioner held in custody for failure to register under the Alien Poll Tax Law. Petitioner discharged.

For Petitioner—M. A. Thomas, Albert H. Elliot, Guy C. Calden.

For Respondent—U. S. Webb, attorney-general.

The petitioner, an alien male inhabitant of the State of California of the age of about forty-eight years, and a citizen of the United States of Mexico, is held in custody by the chief of police of the City and County of San Francisco under a complaint charging him with failure to register as required by the terms of the act known as the Alien Poll Tax Law of 1921, discussed in the opinion filed in the *Matter of Terui on Habeas Corpus*.

Crim. No. 2390, on September 12, 1921. His case is the same as that of Terui in all material respects, except that he claims no protection under any treaty. It is said by his counsel that there is no treaty provision in any treaty between the United States and the United States of Mexico that affords protection against such discrimination against resident aliens in the matter of taxation as is created by the Alien Poll Tax Act. His sole claim is that this act is void as to all alien inhabitants of the state, in that it denies to persons within the jurisdiction of the state the equal protection of the laws, in violation of a provision of section 1 of article XIV, amendments to the Constitution of the United States. The section referred to is as follows:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, *nor deny to any person within its jurisdiction the equal protection of the laws.*" (Italics are ours.)

It is upon the portion of this section that we have italicized that the claim of petitioner is based.

All that we have said with relation to this legislation (the Alien Poll Tax Act of 1921) in our opinion in the Terui case is applicable in this case and need not be repeated here, further than to say that the law was enacted solely in the exercise of the power of taxation for the purpose of raising revenue for state purposes, containing no provision whatever attributable to the exercise of the police power of regulation, and that it imposes on alien inhabitants of the state between certain ages, solely because of their alien character, a tax different in kind from and additional to the taxes required to be paid by all inhabitants, citizens and aliens, alike. No such tax or its equivalent is imposed by our laws on any except alien inhabitants. The law thus imposes an additional burden in the matter of taxation upon such aliens solely because of their alien character, and in this way discriminates against them.

(1) This being the situation, in view of the decisions of the Supreme Court of the United States, there is no escape from the conclusion that the Alien Poll Tax Law cannot be enforced, for the reason that by its enforcement the State of California would deny to persons within its jurisdiction the equal protection of its laws, in violation of the provision of section 1 of the Fourteenth Amendment that no state shall "deny to any person within its jurisdiction the equal protection of the laws".

(2) It is settled that the word "person" as used in this amendment includes aliens. It was said in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'. These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality." The rights of subjects of the Emperor of China were here being discussed. In *Truax vs. Raich*, 239 U. S. 33, decided November 1, 1915, the rights of an alien who was a citizen of Austria and resident of the State of Arizona were involved. The Supreme Court, speaking through Mr. Justice Hughes, said (p. 39): "Upon the allegations of the bill it must be assumed that the complainant, a native of Austria, has been admitted to the United States

under the federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. Being lawfully an inhabitant of Arizona, the complainant is entitled under the fourteenth Amendment to the equal protection of its laws. The description—"any person within its jurisdiction"—as it has frequently been held, includes aliens." The court then quoted approvingly the portion of the opinion in *Yick Wo vs. Hopkins*, *supra*, that we have quoted above. (See, also, *Fraser vs. McConway*, 82 Fed. Rep. p. 257.) Petitioner, therefore, though an alien inhabitant of California, is by this provision of the Federal Constitution guaranteed the equal protection of the laws of California.

The meaning of "the equal protection of the laws" thus guaranteed by the Federal Constitution to every person within the jurisdiction of a state is not left in doubt by the decisions in so far as such an act as the one here involved is concerned. In *Yick Wo vs. Hopkins*, *supra*, it is said that "the equal protection of the laws is a pledge to the protection of equal laws." This was approvingly quoted in *Truax vs. Raich*, *supra*. In *Barbier vs. Connolly*, 113 U. S. 27, 31, the Supreme Court of the United States declared that it was undoubtedly intended thereby "that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition", etc. (Italics ours.) As is shown by the opinion in *Yick Wo vs. Hopkins*, *supra*, the legislation enacted by Congress for the enforcement of the amendment, popularly known as the Civil Rights Statutes, declared that "all persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other". (Italics ours.) What is said in *Barbier vs. Connolly*, *supra*, and the federal statute just quoted sufficiently shows the subject matter as to which the alien inhabitant is given by the Constitution "a pledge of the protection of equal laws", laws free from discrimination based solely on his alien character. Stated very generally, the requirement is for equal protection and security for all, citizens and aliens alike, under like circumstances, in the enjoyment of their personal and civil rights, and in the imposition of burdens, such as penalties, taxes, etc. As is stated in the opinion in *Truax vs. Raich*, *supra*, the constitutional guaranty, in so far as an alien is concerned, has no application to laws of a state relating to such matters as the regulation or distribution of the public domain, or of the common property or resources of the people of the state, or, it is suggested, laws relating to the devolution of the real property therein. (See *Truax vs. Raich*, 239 U. S., pp. 39 and 40.) But that it does guarantee the alien "equal laws" in the matter of the imposition of such burdens on him and his property as taxes seems clear. No question of discriminatory taxation laws was directly involved in the decisions of the Supreme Court that we have cited, but the rule of these decisions is clearly applicable to such

a case. In *The Railroad Tax Cases*, 13 Fed. Rep., p. 722, Justice Field, in his opinion in the circuit court, said: "The Fourteenth Amendment to the Constitution, in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, imposes a limitation upon the exercise of all the powers of the state which can touch the individual or his property, including among them that of taxation. Whatever the state may do, it cannot deprive anyone within its jurisdiction of the equal protection of the laws. * * * Unequal exactions in every form, or under any pretense, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid." (See, also, *Frasier vs. McConway etc. Co.*, 82 Fed. Rep. 257; *Juanita Limestone Co. vs. Fagley*, 187 Pa. St. 193.) This is so clearly true, in view of the general principles declared by the United States Supreme Court in the cases we have cited, as not to require discussion. (3) Tax laws that avowedly lay a different and higher burden upon a portion only of all those similarly situated, that is all those among whom no difference "which bears a reasonable and just relation" to the matter exists (*Gulf etc. Ry. Co. vs. Ellis*, 165 U. S. 150, 155), exempting the remaining portion from the burden, are not "equal laws", and their enforcement would deprive the persons so burdened of the equal protection of the laws. We do not see how this can be fairly questioned.

That the act does this very thing is clear. The sole distinction between the male inhabitants of California so burdened with the poll tax and those not so burdened, in so far as all matters material to imposition of the tax is concerned, is that the former are aliens and the latter citizens. This is the sole basis of the attempted classification. As was said in *Gulf etc. Ry. Co. vs. Ellis*, *supra*, at page 165: "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." (4) In the case at bar the only difference is such that, in view of the language of section one of the Fourteenth Amendment relative to equal protection of the laws, it cannot in the nature of things constitute a proper basis for classification, for the plain effect of that section is to forbid any distinction in such a matter as this based on that fact alone.

It follows from what we have said that the Alien Poll Tax Law must be held to be in violation of the terms of section one of the Fourteenth Amendment of the Constitution of the United States, which by the express terms of section 2 of article VI thereof is declared to be "the supreme law of the land", binding on the judges in every state "anything in the constitution or laws of any state to the contrary notwithstanding". It is therefore ineffective for any purpose.

The petitioner is discharged from custody.

ANGELLOTTI, C. J.

We concur:

SHAW, J.

LENNON, J.

WILBUR, J.

SHURTLEFF, J.

SLOANE, J.

LAWLOR, J.

CHAPTER II.—JUNK BUSINESS TEST CASE.

M. MIYAKE and K. OKAZAKI, Co-Partners Engaged in Business under the Firm Name and Style of Togo Junk Company, Plaintiffs, vs. THE CITY OF SEATTLE, a Municipal Corporation, et al., Defendants.

IN THE WASHINGTON SUPERIOR COURT.

No. 140637.

1. AFFIDAVIT FOR WRIT OF MANDAMUS.

State of Washington, County of King, ss.:

M. Miyake and K. Okazaki, after being duly sworn, on oath depose and say:

I.

That plaintiffs are now and at all times hereinafter mentioned were subjects of the Emperor of Japan; that each of them have been lawfully residing in the City of Seattle, County of King, State of Washington, for several years last past, each having duly entered the United States and having complied with all acts of Congress and regulations thereto appertaining relating to the entry of aliens into the confines of the United States.

II.

That the defendant, the City of Seattle, is now and at all times hereinafter mentioned was a municipal corporation of the first class, organized and existing under and by virtue of the laws of the State of Washington; that at the time of the doing of the acts hereinafter complained of, the defendant, C. B. Fitzgerald, was and ever since has been the duly elected, qualified and acting as mayor of said city, and the defendants Lane, Haas, Moore, Bolton, Hesketh, Thompson, Carroll, Drake and Erickson were and ever since have been the duly elected, qualified and acting as councilmen and members of the city council, of the defendant, the City of Seattle, and at all times the defendant J. F. Warren has been and now is the duly appointed, qualified and acting as chief of police of the defendant, the City of Seattle.

III.

That there is now and ever since the 4th day of June, 1917, has been, in full force and effect, Ordinance No. 37317, of the City of Seattle, entitled "An ordinance relating to and regulating the maintenance and operation of junk shops and junk wagons in the City of Seattle, providing penalties for violations and repealing secs. 40 to 48, inclusive, of Ordinance No. 15,855", passed by the city council on the 23rd day of April, 1917, approved by the mayor of the City of Seattle on the 30th day of April, 1917, and published the 4th day of May, 1917.

IV.

That on the 10th day of January, 1919, pursuant to plaintiffs' application and said ordinance, there was granted to the plaintiffs by the defendant, the City of Seattle, a license to engage in the junk business in the City of Seattle, which ever since has been in full force and effect, for the period of one year, beginning January 10, 1919, and expiring January 10, 1920; that the plaintiffs immediately engaged in the junk business in the City

of Seattle, invested a large sum of money therein, and for that purpose have taken a lease of the premises they now occupy, together with a warehouse approximately 30x40 feet, for the term of five years beginning January 1, 1919, and ending December 31, 1923, at a monthly rental of one hundred (\$100) dollars; that the plaintiffs employ seven men and one telephone operator as permanent employees and hire additional help from time to time to handle their additional work; that the assets which the plaintiffs have acquired in their said business amount approximately to thirty thousand (\$30,000) dollars, including their stock of goods on hand, merchandise, fixtures, machinery, two auto trucks and one passenger automobile; that their business during said year has consisted and now consists principally in buying junk goods from various junk peddlers and wholesalers in the States of Washington, Montana, Oregon, Idaho, and then selling the merchandise so purchased to various parties in the Northwestern part of the United States and exporting a considerable amount thereof to foreign countries; that the business above mentioned, of plaintiffs, has increased in the last six or seven months very largely and runs on an average of from approximately \$11,000 to \$42,000 per month.

V.

That in conducting their junk business as above mentioned the plaintiffs have at all times fully and completely complied with all laws and ordinances concerning the same, together with all regulations of the City of Seattle prescribed therefor, and have conducted their business with strict regard to honesty and integrity, and have built up a very valuable good will throughout the Northwest and in foreign countries among the customers with whom they have dealt, either as purchasers or sellers, and the business so conducted by plaintiffs is worth the sum of fifty thousand (\$50,000) dollars.

VI.

That heretofore on the 17th day of November, 1919, the plaintiffs duly made application for a license to engage in the junk business in the City of Seattle, and for a renewal of their said license, to become effective January 10, 1920, the expiration of the present license, now held by them from the defendant the City of Seattle, such application being as required by the defendant, the City of Seattle, upon forms prescribed by said city and tendered to the defendant, the City of Seattle, the amount of the fee required by the city therefor; that said application was referred to the license committee of the defendant, the City of Seattle, which committee duly made report to the said council of the defendant, the City of Seattle, that a license be granted to the plaintiffs as applied for, but on November 24, 1919, the council of the City of Seattle and the above-named councilmen of the defendant, the City of Seattle, refused to grant said license and refused to pass an ordinance theretofore duly introduced in said city council granting a license to the plaintiffs, as above set forth, upon the sole and only ground that the plaintiffs were subjects of the Emperor of Japan and were not citizens of the United States of America, despite and contrary to the fact that these plaintiffs at all times were fit and suitable persons to have and hold a license from the defendant, the City of Seattle, to engage in the junk business, as aforesaid, and despite the fact that such licenses have been and are being granted to citizens of the United States similar in all respects to the plaintiffs except as to citizenship.

VII.

That on the 5th day of April, 1911, there was duly proclaimed by the

President of the United States, with the advice and consent of the Senate of the United States, a treaty between the United States and the Empire of Japan, which ever since has been in full force and effect, and of which article I is as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

VIII.

That the action of the defendants, the City of Seattle, and the members of the council thereof, is contrary to said treaty, and the action of said defendants was and is in violation of the terms thereof, and the protection of the provisions of said treaty and especially of article I thereof, is hereby invoked by these plaintiffs and each of them and said plaintiffs and each of them insist that by virtue of said treaty, and especially article I thereof, the action of defendants in denying to plaintiffs said licenses above mentioned is void and can not be enforced against the plaintiffs or either of them, and is a violation of the rights secured to them thereby.

IX.

That the action of the said defendants in denying to the plaintiffs such license, as aforesaid, violates the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives these plaintiffs and each of them of their liberty and their property without due process of law, and denies plaintiffs and each of them the equal protection of the law. Protection of the provisions of said section I of the Fourteenth Amendment to the Constitution of the United States is hereby invoked by these plaintiffs and each of them and said plaintiffs and each of them insist that by virtue of said provisions the action of defendants in denying said license cannot be denied to these plaintiffs consistent with provisions of said section I of the Fourteenth Amendment to the Constitution of the United States.

The action of the defendants in denying said license to the plaintiffs violates the provisions of section III and section XII of article I of the constitution of the State of Washington, in that it deprives plaintiffs and each of them of their liberty and property without due process of law and

deprives plaintiffs and each of them of the equal protection of the law guaranteed by the said sections above referred to. Protection of the provisions of said sections III and XII, article I, of the constitution of the State of Washington, is hereby especially invoked by these plaintiffs and each of them, and said plaintiffs and each of them insist that by virtue of said provisions the action of the defendants in denying said license to the plaintiffs is void and contrary to law and that such license cannot be denied to these plaintiffs consistent with said provisions of the constitution of the State of Washington.

X.

That the plaintiffs, as aforesaid, have on hand and own in their said business aforesaid, approximately thirty thousand (\$30,000.00) dollars in value of physical assets, as distinguished from good will, and if the defendants, said City of Seattle and said council are permitted to refuse to grant to these plaintiffs said license, the defendant, J. F. Warren, as chief of police of the City of Seattle, will upon the expiration of their said license on January 10, 1920, arrest these plaintiffs for conducting a junk business in the City of Seattle without a license and if the defendants are permitted to deny these plaintiffs such license and to arrest them as aforesaid, the business which they have built up and acquired by hard work, honesty and integrity and the investment of their money, as aforesaid, will become practically worthless to them and they will be compelled to dispose of their merchandise and physical assets now owned by them, at forced sale, and at prices which would represent but a small fraction of the value thereof, and the good will built up and acquired by these plaintiffs would be wholly and irrevocably lost and destroyed to them; that the plaintiffs will, upon the expiration of their license as aforesaid, be placed under arrest by the defendants, and particularly the chief of police, unless this court enjoins and restrains the defendants from so doing and but for such injunction the business and property of the plaintiffs will be irrevocably lost and destroyed to them and the plaintiffs will be irreparably damaged thereby.

That it is necessary a temporary restraining order issue out of the court, without notice, enjoining and restraining the defendants above named and each of them from arresting or causing or permitting the plaintiffs to be arrested by any officer of the defendant, the City of Seattle, upon the ground they are conducting a junk business in the City of Seattle without having a license so to do, and plaintiffs have no adequate remedy of law and are relievable only in a court of equity.

That if plaintiffs are for the space of a few days only placed under arrest and refused a right to conduct their business, a very large and irreparable loss will accrue to them, the good will which they have built up will be destroyed and their reputation and the reputation of their business will be irrevocably destroyed without any recourse whatever on the part of the plaintiffs against the defendants therefor.

XI.

That plaintiffs have complied with all the laws of the State of Washington relating to the filing of a certificate in the office of the county clerk of King County, Washington, setting forth the names and addresses of persons doing business under the name of Togo Junk Company;

Wherefore plaintiffs pray judgment, as follows:

I.

That an alternative writ of mandate issue to the defendants above named and each of them directed, ordering and directing them immediately after

the receipt of the writ to grant to the plaintiffs a license to engage in the junk business in the City of Seattle, King County, Washington, or to show cause before this court on the — day of January, 1920, at the hour of 9:30 a. m. in department No. 1 of the King County court house, in the City of Seattle, King County, Washington, why they have not done so.

II.

That upon the hearing of said order to show cause, a peremptory writ of mandate to the defendants above named directed be issued ordering and directing said defendants to grant to plaintiffs a license permitting them to engage in the junk business in the City of Seattle, King County, Washington.

III.

That a temporary restraining order without notice issue herein to the defendants above named directed, enjoining and restraining them until the further order of this court from arresting or causing to be arrested the plaintiffs above named or any of their employes on the ground that they are conducting and engaged in the junk business in the City of Seattle, without a license issued by the defendant, the City of Seattle, so to do, and from in any wise interfering with the plaintiffs or their said business, property or assets on the ground that they are operating or conducting the same without having a license granted by the City of Seattle so to do, and that an order to show cause to the defendants above named directed, ordering and directing them and each of them to show cause before this court on the — day of January, 1920, at the hour of 9:30 o'clock a. m. in department No. 1 of the above-entitled court in the King County court house, Seattle, King County, Washington, why they should not be so enjoined and restrained until the entry of the final decree herein.

IV.

That plaintiffs have such other and further relief as to the court may seem just and equitable, together with their costs and disbursements herein to be taxed.

2. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on for trial before the court on the 8th day of June, 1920, the plaintiffs appearing in person and by Piles & Halverstadt, their attorneys, the defendants appearing by Walter F. Meier, as corporation counsel of the City of Seattle, and Thomas J. L. Kennedy, assistant corporation counsel of the City of Seattle, and testimony and evidence on behalf of the parties having been offered and received by the court and the cause having been submitted to the court for consideration and decision, and the court, being fully advised in the premises, does now make the following

FINDINGS OF FACT.

I.

That the plaintiffs are now and at all times hereinafter mentioned were subjects of the Emperor of Japan; that each of the plaintiffs has been lawfully residing in the City of Seattle, County of King, State of Washington, for several years last past, each having duly entered the United States and having duly complied with all acts of Congress and regulations thereto appertaining relating to the entry of aliens to the confines of the United States; that each of the plaintiffs has been continuously residing in the City of Seattle, King County, State of Washington, since their entry into the United States as aforesaid.

II.

That the defendant, the City of Seattle, is now and at all times hereinafter mentioned was a municipal corporation of the first class, organized and existing under and by virtue of the laws of the State of Washington; that at the time of the doing of the acts hereinafter complained of the defendant, C. B. Fitzgerald, who was named in the original application herein, was duly elected, qualified and acting mayor of said city, but subsequent to the commencement of this action, the term of said Fitzgerald as such mayor has expired and the defendant Hugh M. Caldwell ever since has been and now is the duly elected, qualified and acting mayor of the defendant, the City of Seattle. That at the time of the commencement of this action, W. D. Lane, named as one of the defendants in the original application herein, was a duly elected, qualified and acting councilman of the City of Seattle, but his term of office expired prior to the trial of this action, and the defendant Phillip Tindell is the duly elected, qualified and acting successor in the office of the defendant Lane as one of the duly elected, qualified and acting councilmen of the defendant, the City of Seattle. That the defendants Haas, Moore, Bolton, Hesketh, Thompson, Carroll, Drake and Erickson, at the time of the commencement of this action and at the time of the matters complained of in the application herein, were and ever since have been duly elected, qualified and acting councilmen and members of the city council of the defendant, the City of Seattle. That at the time of the original application herein, J. F. Warren was the duly appointed, qualified and acting chief of police of the defendant, the City of Seattle, but has since been removed as such, and prior to the trial of this action, the defendant Wm. H. Searing was duly appointed, qualified as chief of police of the defendant, the City of Seattle, and ever since his said appointment and qualification has been the duly appointed, qualified and acting chief of police of the defendant, the City of Seattle.

III.

That there is now and ever since the 4th day of June, 1917, has been in full force and effect Ordinance No. 37317 of the City of Seattle, entitled "An ordinance relating to and regulating the maintenance and operation of junk shops and junk wagons in the City of Seattle, providing penalties for violation and repealing secs. 40 to 48, inclusive, of Ordinance No. 15855," passed by the city council on the 23d day of April, 1917, approved by the mayor of the City of Seattle on the 30th day of April, 1917, and published on the 4th day of May, 1917.

IV.

That on the 10th day of January, 1919, pursuant to plaintiffs' application and ordinance, there was granted to the plaintiffs by the defendant, the City of Seattle, a license to engage in the junk business in the City of Seattle, which was in full force and effect for the period of one year beginning January 10, 1919, and expiring January 10, 1920; that the plaintiffs immediately engaged in the junk business as co-partners under the firm name and style of Togo Junk Company, in the City of Seattle, and invested a large sum of money therein, and for that purpose leased the premises which they ever since occupied and now occupy, to-wit: 2410 First Avenue, South, Seattle, Washington, together with a warehouse approximately 30 by 40 feet, for the term of five years beginning January 1, 1919, and ending December 31, 1923, at a monthly rental of one hundred (\$100) dollars; that plaintiffs employ on the average of seven men and one telephone operator as permanent employees and hire additional help from time to time to handle their additional work; that the assets which the plaintiffs have acquired in their

said business amount approximately to twenty thousand (\$20,000) dollars, including their stock of goods on hand, merchandise, fixtures, machinery, and auto trucks and one passenger automobile; that the business of plaintiffs during said year has consisted and now consists principally in buying junk goods from various junk peddlers and wholesalers in the States of Washington, Montana, Oregon, Idaho, and then selling the same to purchasers and various parties in the Northwestern part of the United States and exporting a considerable amount thereof to foreign countries; that the business above mentioned of plaintiffs has increased in the last six or seven months very largely and runs on an average of from approximately \$11,000.00 to \$42,000.00 gross per month.

V.

That in conducting their junk business as above mentioned the plaintiffs have at all times fully and completely complied with all laws and ordinances concerning the same, together with all regulations of the City of Seattle prescribed therefor, and have conducted their business with strict regard to honesty and integrity, and have built up a very valuable good will throughout the Northwestern part of the United States and in foreign countries among the customers with whom they have dealt, either as purchasers or sellers, and the business so conducted by plaintiffs is substantial value.

VI.

That the place in which the plaintiffs conducted their business, above set forth, was at all times a fit and proper place for carrying on the business of buying and selling junk and keeping junk, and the applicants at all times hereinafter mentioned were, ever since have been and now are entirely fit and proper persons to engage in the business of buying and selling junk.

VII.

That heretofore on the 17th day of November, 1919, the plaintiffs duly made application for a license to engage in the junk business in the City of Seattle, and for a renewal of their said license, to become effective January 1, 1920, the expiration of the license so granted by the City of Seattle to them as aforesaid, which at the time of the making of the application herein had not expired, such application being as required by the defendant, the City of Seattle, upon forms prescribed by the said city and tendered to the defendant, the City of Seattle, the amount of the fee required by the city for such license; that said application was referred to the license committee of the city council of the defendant, the City of Seattle, which committee duly made report to the city council of the defendant, the City of Seattle, that a license be granted to the plaintiffs as applied for, but on November 2, 1919, the council of the City of Seattle and the then councilmen of the defendant, the City of Seattle, refused to grant said license and refused to pass an ordinance theretofore duly introduced in said city council granting a license to the plaintiffs, as above set forth, upon the sole and only ground that the plaintiffs were subjects of the Emperor of Japan and were not citizens of the United States of America, despite and contrary to the fact that the plaintiffs were and at all times were fit and suitable persons to have and hold a license from the defendant, the City of Seattle, to engage in the junk business as aforesaid, and despite the fact that the place at which said junk business was in all respects a fit and suitable place for the buying and selling and storing of junk, and despite the fact that such licenses have by the City of Seattle been granted to citizens of the United States similar in all respects to the plaintiffs except as to citizenship.

VIII.

That after the commencement of this action and pursuant to a suggestion of this court, the plaintiffs duly paid to the defendant, the City of Seattle, the sum of one hundred (\$100.00) dollars, as and for the license fee of the plaintiffs for the conducting of the junk business in the City of Seattle for one year, beginning January 10, 1920, which sum was paid to the defendant, the City of Seattle, without prejudice to its rights and contentions in this action.

IX.

That on the 5th day of April, 1911, there was duly proclaimed by the President of the United States, with the advice and consent of the Senate of the United States, a treaty between the United States and the Empire of Japan, which ever since has been in full force and effect, and of which article I is as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

X.

That the action of the defendant, the City of Seattle, and the members of the council thereof was contrary to said treaty, and in violation of the terms thereof, and the plaintiffs in this proceeding invoked the protection of the provisions of the treaty and especially article I thereof, and each of them insisted in this action of the defendants in denying to plaintiffs said license above mentioned, was void and could not be enforced against the plaintiffs or either of them, and was a violation of the rights secured to them thereby.

XI.

That in this section the plaintiffs invoked the protection of the provisions of section 1 of the Fourteenth Amendment of the Constitution of the United States in that the action of the defendants deprived the plaintiffs and each of them of their liberty and property without due process of law, and denied to the plaintiffs and each of them the equal protection of the law, and at all times insisted upon the same, and at all times especially invoked the provisions of said section 1 of said Fourteenth Amendment to

the Constitution of the United States, and at all times insisted that by virtue of said section the action of the defendants in denying said license was void.

XII.

That protection of the provisions of section III and XII of article I of the constitution of the State of Washington was especially invoked by these plaintiffs and each of them, and said plaintiffs and each of them insisted that by virtue of said provisions the action of the defendants in denying said license to the plaintiffs is void and contrary to law and that such license cannot be denied to these plaintiffs consistent with said provisions of the constitution of the State of Washington.

XIII.

That although the defendant, the City of Seattle, and the members of the city council thereof denied to the plaintiffs a license to conduct their junk business in the City of Seattle as aforesaid, the said city and the chief of police and his predecessor in office would, except for this action, on January 10, 1920, and subsequent thereof, have arrested the plaintiffs for conducting a junk business in the City of Seattle, without a license, and but for this action, the business which the plaintiffs had built up in the City of Seattle and in which they invested their money as aforesaid would have become practically worthless to them and they would have been compelled to dispose of their merchandise and physical assets now owned by them, at forced sale and at prices which would represent but a small fraction of the value thereof; that if the plaintiffs were for the space of a few days only placed under arrest and refused a license to conduct their business, a very large and irreparable loss would have accrued to them, the good will which they had built up would be destroyed, and their reputation and the reputation of their business would be irrevocably destroyed without any recourse whatsoever on the part of the plaintiffs therefor; that the plaintiffs have no adequate remedy at law, but are relievable only through the orders of this court.

XIV.

That the plaintiffs prior to the trial hereof complied with all the laws of the State of Washington relating to the filing of a certificate in the office of the clerk of the above-entitled court, setting forth the names and addresses of all persons interested in and doing business under the name of Togo Junk Company. That plaintiffs are unable to fluently speak the English language.

Done in open court this 10th day of August, 1920.

CLAY ALLEN, Judge.

And from the foregoing findings of fact the court deduces the following

CONCLUSIONS OF LAW.

That the plaintiffs are entitled to a judgment herein as follows:

1. That a peremptory writ of mandate issue in this cause, out of the above-entitled court and under the seal of the court, to the defendant, the City of Seattle, the mayor and councilmen thereof directed, commanding them forthwith to grant and issue to the plaintiff a license to conduct the junk business at No. 2410 First Avenue, South, in the City of Seattle, King County, Washington, for the period of one year beginning January 10, 1920, and ending January 10, 1921, upon the same and equal terms as are imposed by said defendants upon all other persons and corporations. And that the defendants be enjoined and restrained from interfering with

the plaintiffs after and upon compliance by them with the terms and conditions imposed upon all other applicants for licenses of like kind.

2. That the plaintiffs have and recover of and from the defendants their costs and disbursements herein to be taxed.

Done in open court this 10th day of August, 1920.

CLAY ALLEN, Judge.

PEREMPTORY WRIT OF MANDATE.

To the City of Seattle, a municipal corporation; Hugh M. Caldwell, as mayor of said city; Phillip Tindall, A. F. Haas, Wm. H. Moore, T. H. Bolton, R. H. Thompson, R. B. Hesketh, Oliver T. Erickson, John E. Carrol, and A. F. Drake, as councilmen and members of the city council of the City of Seattle, and Wm. H. Searing, as chief of police of the City of Seattle, and each of you, greeting:

Whereas, the plaintiffs made due application to this court for a writ of mandate herein, issue was joined thereon, and a trial duly had in this court, all of the parties hereto appearing; and

Whereas, the above-entitled court duly made and entered its findings of fact, conclusions of law, and decree herein; and

Whereas, the plaintiffs are now and at all times hereinafter mentioned were subjects of the Emperor of Japan, each of the plaintiffs having been lawfully residing in the City of Seattle, County of King, State of Washington, for several years last past, having duly entered the United States and having duly complied with all acts of Congress and regulations thereto appertaining relating to the entry of aliens to the confines of the United States, and each of the plaintiffs has been continuously residing in the City of Seattle, King County, State of Washington, since their entry into the United States as aforesaid; and

Whereas, the City of Seattle is now and at all times hereinafter mentioned was a municipal corporation of the first class, organized and existing under and by virtue of the laws of the State of Washington; that at the time of the doing of the acts hereinafter mentioned, the defendant C. B. Fitzgerald, who was named in the original application herein, was the duly elected, qualified and acting mayor of the said city, but subsequent to the commencement of this action the term of said Fitzgerald as such mayor expired, and the defendant Hugh M. Caldwell ever since has been and now is the duly elected, qualified and acting mayor of the defendant, the City of Seattle; and at the time of the commencement of this action, W. D. Land, named as one of the defendants in the original action herein, was a duly elected, qualified and acting councilman of the City of Seattle, but his term of office expired prior to the trial of this action, and the defendant Phillip Tindall is the duly elected, qualified and acting successor in the office of the defendant Lane as one of the duly elected, qualified and acting councilmen of the defendant, the City of Seattle; the defendants Haas, Hesketh, Thompson, Carroll, Drake, Moore and Bolton and Erickson at the time of the commencement of this action and at all times herein mentioned were and ever since have been duly elected, qualified and acting councilmen, and members of the city council of the defendant, the City of Seattle; at the time of the original application herein J. F. Warren was the duly appointed, qualified and acting chief of police of the defendant, the City of Seattle, but has since been removed as such, and prior to the trial of this action the defendant William H. Searing was the duly appointed, qualified and acting chief of police of the defendant,

the City of Seattle, and ever since his appointment and qualification has been the duly appointed, qualified and acting chief of police of the defendant, the City of Seattle; and

Whereas, there is now and ever since the 4th day of June, 1917, has been in full force and effect Ordinance No. 37317 of the City of Seattle, entitled "An ordinance relating to and regulating the maintenance and operation of junk shops and junk wagons in the City of Seattle, providing penalties for violations and repealing sections 40 to 48, inclusive, of Ordinance No. 15855", passed by the city council on the 23rd day of April, 1917, approved by the mayor of the City of Seattle on the 30th day of April, 1917, and published on the 4th day of May, 1917; and

Whereas, that on the 10th day of January, 1919, pursuant to plaintiff's application and said ordinance, there was granted to the plaintiffs by the defendant, the City of Seattle, a license to engage in the junk business in the City of Seattle, which was in full force and effect for the period of one year beginning January 10, 1919, and expiring January 10, 1920; under which application the plaintiffs engaged in the junk business as co-partners under the firm name and style of Togo Junk Company, in the City of Seattle, and invested a large sum of money in such business, and for that purpose leased the premises which they ever since occupied and now occupy, to-wit, No. 2410 First Avenue South, Seattle, Washington, together with a warehouse approximately 30 by 40 feet, for the term of five years beginning January 1st, 1919, and ending December 31, 1923, at a monthly rental of one hundred dollars; and at the time of the application herein and the trial of this action, the plaintiffs employed on an average of seven men and one telephone operator as permanent employees and hired additional help from time to time to handle their additional work; and the assets which the plaintiffs have acquired in their said business amount approximately to twenty thousand (\$20,000) dollars, including their stock of goods on hand, merchandise, fixtures, machinery, and auto trucks and one passenger automobile; and the business of plaintiffs during said year has consisted and now consists principally in buying junk from the various junk peddlers and wholesalers in the States of Washington, Montana, Oregon, Idaho, and selling the same to purchasers and various parties in the Northwestern part of the United States and exporting a considerable amount thereof to foreign countries; and the business above mentioned has increased in the last five, six or seven months very largely and runs on an average of from approximately \$11,000.00 to \$42,000.00 gross per month; and

Whereas, in conducting their junk business above mentioned, the plaintiffs have at all times fully and completely complied with all laws and ordinances concerning or relating to the same, together with all regulations of the City of Seattle prescribed therefor, and have conducted their business with strict regard to honesty and integrity, and have built up a very valuable good will throughout the Northwestern part of the United States and in foreign countries among the customers with whom they have dealt, either as purchasers or sellers, and the business so conducted by plaintiffs is of substantial value; and

Whereas, the place in which the plaintiffs conducted their business above set forth, and are now conducting the same, was and is at all times a proper place for carrying on the business of buying and selling junk and keeping junk, and the applicants at all times hereinafter mentioned were, ever since have been, and now are entirely fit and proper persons to engage in the business of buying and selling junk; and

Whereas, heretofore on the 17th day of November, 1919, the plaintiffs

duly made application for a license to engage in the junk business in the City of Seattle, and for a renewal of their said license, to become effective January 10, 1920, the date of the expiration of the license to be granted by the City of Seattle to them as aforesaid, which at the time of the making of the application above mentioned had not expired, such application being as required by the defendant, the City of Seattle, upon forms prescribed by said city and tendered by the defendant, the City of Seattle, the amount of the fee required by the city for such license; that said application was referred to the license committee of the city council of the defendant, the City of Seattle, which committee duly made report to the city council that a license be granted to the plaintiffs as applied for, but on November 2, 1919, the city council of the defendant, the City of Seattle, refused to grant such license and refused to pass an ordinance theretofore duly introduced in said city council granting a license to the plaintiffs as above set forth, upon the sole and only ground that the plaintiffs were subjects of the Emperor of Japan and not citizens of the United States of America, despite and contrary to the fact that the plaintiffs were then, and at all times theretofore and since, fit and suitable persons to have and hold a license from the defendant, the City of Seattle, to engage in the junk business, as aforesaid, and despite the fact that the place at which said junk business was then being carried on and at which the plaintiffs proposed to carry on the same was in all respects a fit and suitable place for the same and despite the fact that such licenses have been and were being by the defendant, the City of Seattle, granted to citizens of the United States similar in all respects to the plaintiffs, except as to citizenship; and

Whereas, after the commencement of this action and pursuant to a suggestion of this court, the plaintiffs duly paid to the defendant, the City of Seattle, the sum of one hundred (\$100) dollars, as and for the license fee of the plaintiffs for the conducting of the junk business in the City of Seattle for one year, beginning January 10, 1920, which sum was paid to the defendant city without prejudice to its rights and contentions in this action; and

Whereas, on the 5th day of April, 1911, there was duly proclaimed by the President of the United States, with the advice and consent of the Senate of the United States, a treaty between the United States and the Empire of Japan, which ever since has been in full force and effect, and of which article I is as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incidental to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

"They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions"; and

Whereas, the action of the defendant, the City of Seattle, and the members of the city council thereof, was contrary to said treaty, and in violation of the terms thereof, and the plaintiffs in the above proceeding involved the protection of the provisions of the treaty and especially article I thereof, and each of them insisted in this action that by virtue of said treaty and especially article I thereof the action of the defendants in denying to plaintiffs said license above mentioned was void and could not be enforced against them or either of them, and was a violation of the rights secured to them thereby; and

Whereas, in this action the plaintiffs invoked the protection of the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States in that it deprived the plaintiffs and each of them of their liberty and property without due process of law, and denied to them and each of them the equal protection of the law, and at all times insisted upon the same, and at all times especially invoked the provisions of said section 1 of the said Fourteenth Amendment to the Constitution of the United States, and insisted that by virtue of said section the action of the defendants in denying to plaintiff said license above mentioned was void; and

Whereas, in this action the plaintiffs and each of them invoked the protection of the provisions in section III and XII of article I of the constitution of the State of Washington, in that the action of the defendants deprives them and each of them of their liberty and property without due process of law and deprives each of them of the equal protection of the law, and at all times insisted upon the same, and at all times especially invoked the said sections III and XII of article I of the constitution of the State of Washington, and insisted that by virtue of said sections the action of the defendants in denying to plaintiffs said license was void; and

Whereas, although the defendant, the City of Seattle, and the members of the city council thereof denied to the plaintiffs a license to conduct their junk business in the City of Seattle as aforesaid, the said city and the chief of police and his predecessor in office would, except for this action, on January 10, 1920, and subsequent thereto have arrested the plaintiffs for conducting a junk business in the City of Seattle, without a license, and but for this action, the business which the plaintiffs had built up in the City of Seattle and in which they invested their money as aforesaid would have become practically worthless to them and they would have been compelled to dispose of their merchandise and physical assets now owned by them, at forced sale and at prices which would represent but a small fraction of the value thereof; and if the plaintiffs were for the space of a few days only placed under arrest and refused a license to conduct their business, a very large and irreparable loss would have accrued to them, the good will which they had built up would be destroyed, and their reputation and the reputation of their business would be irrevocably destroyed without any recourse whatsoever on the part of the plaintiffs therefor, and the plaintiffs having no adequate remedy at law, but being relievable only through the orders of this court in this proceeding;

Now therefore, you, the defendants, the City of Seattle; Hugh M. Caldwell, as mayor of said city; Phillip Tindell, A. F. Haas, Wm. H. Moore,

T. H. Bolton, R. H. Thompson, R. B. Hesketh, Oliver T. Erickson, John E. Carroll and A. F. Drake, as councilmen and members of the city council of the defendant, the City of Seattle, are hereby commanded forthwith to consider, grant and issue to the plaintiffs above named a license to conduct the junk business at No. 2410 First Avenue South, in the City of Seattle, County of King, State of Washington, for the period of one year beginning January 10, 1920, and ending January 10, 1921, upon the same and equal terms as are imposed by you upon all other persons and corporations, and you, and each of the defendants above named, upon compliance by the plaintiffs with the terms and conditions imposed upon all other applicants for licenses of like kind with that hereinabove mentioned, are enjoined and restrained from interfering with the plaintiffs or either of them in their said business. That plaintiffs are unable to fluently speak the English language.

Witness the Honorable Clay Allen, judge of the above-entitled court, and the seal of said court this 10th day of August, in the year of our Lord one thousand nine hundred and twenty.

PERCY THOMAS,

County Clerk of King County, State of Washington, and Ex Officio Clerk of the Superior Court of the State of Washington for King County.

3. JUDGMENT.

This cause came on for trial before the court on the 8th day of June, 1920, the plaintiffs appearing in person and by Piles & Halverstadt, their attorneys, the defendants appearing by Walter F. Meier, as corporation counsel of the City of Seattle, and Thomas J. L. Kennedy, as assistant corporation counsel of the City of Seattle, and testimony and evidence on behalf of the parties was offered and received by the court, and the court having heretofore made and entered herein its findings of fact and conclusions of law, and being fully advised in the premises,

It is ordered, adjudged and decreed that peremptory writ of mandate issue in this cause out of this court and under the seal of this court to the defendant city, its mayor and councilmen directed, ordering and directing them forthwith to consider, grant and issue to the plaintiffs above named a license to conduct a junk business at No. 2410 First Avenue South in the City of Seattle, King County, Washington, upon the same and equal terms as are imposed by said defendants upon all other persons and corporations, and that the city and the defendants above named be enjoined and restrained from interference with the plaintiffs after and upon compliance by the plaintiffs with the terms and conditions imposed upon all other applicants for licenses of like kind.

It is further ordered, adjudged and decreed that the plaintiffs do have and recover of and from the defendants herein their costs and disbursements herein to be taxed.

Done in open court this 10th day of August, 1920.

To the foregoing, exceptions allowed to the defendants and each of them.

CLAY ALLEN, Judge.

CHAPTER III.—DECISIONS OF CASES ON FOREIGN LANGUAGE ACTS.

1. MEYER CASE.

ROBERT T. MEYER, Plaintiff in Error, vs. THE STATE OF NEBRASKA.

IN THE UNITED STATES SUPREME COURT.

(June 4, 1923.)

Mr. Justice McReynolds delivered the opinion of the court.

Plaintiff in error was tried and convicted in the district court for Hamilton County, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of ten years, who had not attained and successfully passed the eighth grade. The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919, which follows:

"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

"Sec. 2. Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"Sec. 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not less than twenty-five dollars (\$25.00), nor more than one hundred dollars (\$100.00), or be confined in the county jail for any period not exceeding thirty days for each offense.

"Sec. 4. Whereas, an emergency exists, this act shall be in force from and after its passage and approval."

The supreme court of the state affirmed the judgment of conviction, 107 Neb. 657. It declared the offense charged and established was "the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade," in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of biblical stories being used therefor. And it held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion:

"The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a

consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state. (*Pohl vs. State*, 132 N. E. [Ohio] 20; *State vs. Bartels*, 181 N. W. [Ia.] 508.)

"It is suggested that the law is an unwarranted restriction, in that it applies to all citizens of the state and arbitrarily interferes with the rights of citizens who are not of foreign ancestry, and prevents them, without reason, from having their children taught foreign languages in school. That argument is not well taken, for it assumes that every citizen finds himself restrained by the statute. The hours which a child is able to devote to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small. A selection of subjects for its education, therefore, from among the many that might be taught, is obviously necessary. The legislature no doubt had in mind the practical operation of the law. The law affects few citizens, except those of foreign lineage. Other citizens, in their selection of studies, except perhaps in rare instances, have never deemed it of importance to teach their children foreign languages before such children have reached the eighth grade. In the legislative mind, the salutary effect of the statute no doubt outweighed the restriction upon the citizens generally, which, it appears, was a restriction of no real consequence."

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No state * * * shall deprive any person of life, liberty or property without due process of law."

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. (*Slaughter-House Cases*, 16 Wall. 36; *Butchers' Union Co. vs. Crescent City Co.*, 111 U. S. 746; *Yick Wo vs. Hopkins*, 118 U. S. 356; *Minnesota vs. Barber*, 136 U. S. 313; *Allgeyer vs. Louisiana*, 165 U. S. 578; *Lochner vs. New York*, 198 U. S. 45; *Twining vs. New Jersey*, 211 U. S. 78; *Chicago, B. & Q. R. R. vs. McGuire*, 219 U. S. 549; *Truax vs. Raich*, 239 U. S. 33; *Adams vs. Tanner*, 244 U. S. 590; *New York Life Ins. Co. vs. Dodge*, 246 U. S. 357; *Truax vs. Corrigan*, 257 U. S. 312; *Adkins vs. Children's Hospital* [April 9, 1923]; *Wyeth vs. Cambridge Board of Health*, 200 Mass. 474.) The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. (*Lawton vs. Steele*, 152 U. S. 133, 137.)

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares, "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The supreme court of the state has held that "The so-called ancient or dead languages" are not "within the spirit or the purpose of the act." (*Nebraska District of Evangelical Lutheran Synod etc. vs. McKelvie et al.*, Neb. [April 19, 1922].) Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian and every other alien speech are within the ban. Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this state." It is also affirmed that the foreign-born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

For the welfare of his ideal commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent. * * * The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be

deformed, will be put away in some mysterious, unknown place, as they should be." In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussion of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquillity has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams vs. Tanner, supra*, p. 594, pointed out that the mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No sudden emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

2. BARTELS CASE.

AUGUST BARTELS, Plaintiff in Error, 134, vs. THE STATE OF IOWA.

IN THE UNITED STATES SUPREME COURT.
(Nos. 134, 181, 182, 440. OCTOBER TERM, 1922.)
(June 4, 1923.)

Mr. Justice McReynolds delivered the opinion of the court.

The several judgments entered in these causes by the supreme courts of Iowa, Ohio and Nebraska, respectively, must be reversed upon authority of *Meyer vs. Nebraska*, decided today.

Number 134. Plaintiff in error was convicted of teaching pupils in a parochial school below the eighth grade to read German contrary to "An act requiring the use of the English language as the medium of instruction in all secular subjects in all schools within the State of Iowa," approved April 10, 1919.¹ He used English for teaching the common school branches, but taught young pupils to read German. The supreme court of the state held: "The manifest design of this language statute is to supplement the compulsory education law by requiring that the branches enumerated to be taught shall be taught in the English language and in no other. The evident purpose is that no other language shall be taught in any school, public or private, during the tender years of youth, that is, below the eighth grade." (191 Iowa 1060.)

Numbers 181 and 182. Bohning and Pohl, of St. John's Evangelical Congregational School, Garfield Height, Cuyahoga County, Ohio, were severally convicted (102 Ohio St. 474) of violating "An act to supplement section 7762 of the General Code * * * and to repeal section 7729, concerning elementary, private and parochial schools and providing that instruction shall be in the English language" (108 Ohio Laws 614), approved June 5, 1919,² which prohibits the teaching of German to pupils below the eighth grade.

Number 440. An injunction is sought against the governor and attorney-general of the state and the attorney for Platte County to prevent enforcement of "An act to declare the English language the official language of this state, and to require all official proceedings, records and publications to be in such language and all school branches to be taught in said language in public, private, denominational and parochial schools," etc., approved April 14, 1921.³ This statute is subject to the same objections as those offered to the Act of 1919 and sustained in *Meyer vs. Nebraska*, *supra*. The purpose of the later enactment, as stated by counsel for the state, is

¹ Section 1. That the medium of instruction in all secular subjects taught in all of the schools, public and private, within the State of Iowa, shall be the English language, and the use of any language other than English in secular subjects in said schools is hereby prohibited; provided, however, that nothing herein shall prohibit the teaching and studying of foreign languages as such as a part of the regular school course in any such school, in all courses above the eighth grade.

Sec. 2. That any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than twenty-five dollars (\$25.00) nor more than one hundred dollars (\$100.00).

² Sec. 7762-1. That all subjects and branches taught in the elementary schools of the State of Ohio below the eighth grade shall be taught in the English language only. The board of education, trustees, directors and such other officers as may be in control, shall cause to be taught in the elementary schools all the branches named in section 7648 of the General Code. Provided, that the German language shall not be taught below the eighth grade in any of the elementary schools of this state.

Sec. 7762-2. All private and parochial schools and all schools maintained in connection with benevolent and correctional institutions within this state which instruct pupils who have not completed a course of study equivalent to that prescribed for the first seven grades of the elementary schools of this state shall be taught in the English language only, and the person or persons, trustees or officers in control shall cause to be taught in them such branches of learning as prescribed in section 7648 of the General Code or such as the advancement of pupils may require, and the persons or officers in control direct; provided that the German language shall not be taught below the eighth grade in any such schools within this state.

Sec. 7762-3. Any person or persons violating the provisions of this act shall be guilty of a misdemeanor and shall be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and each separate day in which such act shall be violated shall constitute a separate offense.

³ Section 1. The English language is hereby declared to be the official language of this state, and all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools.

Sec. 2. No person, individually or as a teacher, shall, in any private, denominational, or parochial or public school, teach any subject to any person in any language other than the English language.

Sec. 3. Languages other than the English language may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county or the city superintendent of the city in which the child resides. Provided, that the provisions of this act shall

"to place beyond the possibility for legal evasion a prohibition against the teaching in schools of foreign languages to children who have not passed the eighth grade." The supreme court considered the merits of the cause, upheld the statute, and refused an injunction. (Neb., April 19, 1922.)

McKelvie and Davis, formerly governor and attorney-general, no longer occupy those offices. The cause is dismissed as to them. Otto F. Walter is now the county attorney and the judgment below as to him must be reversed.

Reversed.

(Mr. Justice Holmes.)

We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. It is with hesitation and unwillingness that I differ from my brethren with regard to a law like this, but I cannot bring my mind to believe that in some circumstances, and circumstances existing it is said in Nebraska, the statute might not be regarded as a reasonable or even necessary method of reaching the desired result. The part of the act with which we are concerned deals with the teaching of young children. Youth is the time when familiarity with a language is established and if there are sections in the state where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school. But if it is reasonable it is not an undue restriction of the liberty either of teacher or scholar. No one would doubt that a teacher might be forbidden to teach many things, and the only criterion of his liberty under the Constitution that I can think of is "whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a mere arbitrary fiat." (*Purity Extract & Tonic Co. vs. Lynch*, 226 U. S. 192, 204; *Hebe Co. vs. Shaw*, 248 U. S. 297, 303; *Jacob Ruppert vs. Caffey*, 251 U. S. 364.) I think I appreciate the objection to the law, but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.

I agree with the court as to the special proviso against the German language contained in the statute dealt with in *Bohning vs. Ohio*.

Mr. Justice Sutherland concurs in this opinion.

3. JAPANESE LANGUAGE SCHOOL CASE, T. H.

JUDGE ANDRADE HOLDS 1920 AMERICANIZATION ACT CONSTITUTIONAL.

DECISION IN FAMOUS CASE AFFECTS 20,000 PUPILS OF FOREIGN LANGUAGE TEACHERS; LAW DOES NOT CONTRAVENE TREATY WITH JAPAN AS CONTENDED IN INJUNCTION FIGHT.

Hawaii's law regulating the employment of Japanese language school teachers, Act 36, special session 1920, is held constitutional, in a decision handed down yesterday by Judge Frank Andrade.

"Our system of government cannot endure, * * * half American, half

not apply to schools held on Sunday or on some other day of the week which those having the care and custody of the pupils attending same conscientiously observe as the Sabbath, where the object and purpose of such schools is the giving of religious instruction, but shall apply to all other schools and to schools held at all other times. Provided that nothing in this act shall prohibit any person from teaching his children in his own home any foreign language.

* * *

Sec. 7. Chapter 249 of the Session Laws of Nebraska for 1919, entitled "An act relating to the teaching of foreign languages in the State of Nebraska," is hereby repealed. * * *

Japanese," the court held, in rendering the opinion that affects 20,000 young Japanese children attending foreign language schools in the territory and 300 Japanese language schools.

QUALIFICATIONS ARE VALID.

All language school teachers must hold a certificate from the territorial department of education, showing that they are possessed of ideals of democracy, knowledge of American history and institutions and know how to read, write, and speak the English language, as a result of the court's ruling.

The matter was before the court on a petition for a bill of temporary injunction against Act 36, sought by the Kalihi and Palama Japanese Language Schools, John A. Matthewman, attorney-general of the territory, and Willard E. Givens, superintendent of public instruction, being named as respondents. Tomizo Tanegawa acted for the former school, Saichiro Nakashima for the latter.

CONTENTION OF SCHOOLS.

The Japanese litigants requested the injunction on the grounds that Act 36 is invalid and unconstitutional, in that it denies equal protection of the law, in violation of the Fourteenth Amendment; in that Act 36 contravenes the Fifth Amendment; in that it is contrary to the Treaty of Commerce and Navigation, entered into between the United States and Japan, proclaimed April 5, 1911; in that Act 36 is arbitrary, confiscatory, unreasonable, and oppressive.

The Japanese contended that the legislature is without authority to legislate in any respect affecting private schools, but conceded the power of the legislature to regulate or prohibit private schools is subject to the same limitations as the power to regulate private property rights in general.

The attorney-general, in answer to the attack against Act 36, pointed out clearly the title of the law: "An act to prescribe certain qualifications for school teachers for the purpose of safeguarding American citizenship in the Territory of Hawaii."

J. Lightfoot represented the language schools in the case, Harry Hewitt, deputy attorney-general, appeared for the territory. Walter F. Frear, with Allen Steadman, assisted in the fight against the injunction.

The schools will appeal the decision of Judge Andrade to the territorial supreme court, Lightfoot announced, following the court's decision.

THE COURT'S DECISION.

In his decision, Judge Andrade queries:

1. Are the petitioners (the language schools) the proper parties to ask this court for the relief which they seek by their bill?

His answer, after citing many authorities is:

"I am bound to hold that the petitioners have failed to allege such direct injury to their property rights, to be protected as is necessary under the law, to entitle them to the relief prayed for.

"The petitioners in this case stand practically in the position of one who seeks to take advantage of the unconstitutionality of a law in which they have only an indirect interest and by the enforcement of which they have suffered, and will suffer, no legal injury."

Is Act 36 constitutional? (Decisions in other states are quoted.)

LEGISLATURE SUSTAINED.

These decisions indicate the extent to which the courts have gone in sustaining statutes enacted by the various state legislatures in the exercise

of the police power and designed for the purpose of promoting public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health, also that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based on adequate grounds.

The legislature of Hawaii, in passing Act 36, was doubtless moved to do so because of past experience and realized what might happen if the teachers in the foreign language schools continued without the check or regulation required by the act. It correctly appreciates and understands the needs of the people of this territory and further realizing that the success of our American democracy may be said to depend largely upon the school education available to every American child, if he is to develop to the highest extent to which he is capable. To a great degree is education the most essential means necessary to fit every American child for the duties of government committed to it by our Constitution. If a part of this education is the learning of the Japanese language, if allowed to be taught by teachers who do not know or who are indifferent to our "ideals of democracy, knowledge of American history and institutions or who do not know how to read, write or speak the English language," such teachers will not impart to the future citizens of Hawaii these essential principles of Americanism with any degree of learning even though such teachers may desire earnestly to do so.

WOULD DESTROY PLAN.

In this case Japanese parents who own the Japanese schools in the territory desire to employ Japanese teachers (who do not possess the above qualifications) to teach the Japanese language to the children of Japanese parents who are born in Hawaii. If the practice desired by the petitioners is allowed to continue, the desire of the people of this territory as expressed by the legislature to foster a homogeneous people with American ideals must fail. It is a matter of general knowledge that the Japanese people are a most patriotic people, faithful in the extreme to their Emperor and their institutions. In Japan the highest authority and the ultimate source of all authority is His Majesty the Emperor, and the Imperial line symbolized by the Imperial crest. In America the highest authority and the ultimate source of all authority is the American people, and it is symbolized by the national flag.

NATIONAL SYSTEMS DIFFERENT.

The respective systems of government of these two nations are very different indeed. The Territory of Hawaii conducts and maintains a very complete public school system and these 20,000 children who attend the Japanese language schools also attend the government schools, where they are surely taught ideals of democracy, knowledge of American history, etc., by teachers who are qualified to teach these subjects. The teacher is always considered the friend, guide and philosopher of the pupil. Occasions will surely and frequently arise during the course of instruction in the Japanese language school when comparisons will have to be made in regard to Japanese and American ideals. It is safe to presume that unless the teachers engaged by the Japanese language schools possess the knowledge required by Act 36, and endeavor earnestly to live up to the spirit of said act, their natural inclination will be to make a choice in favor of the traditions and ideals of the country of their ancestry. This, plus the natural inclination of such youths to learn from people of their own race, will naturally cause their

young minds to absorb matters and things which will surely be inimical to the best public interest. Under this system the pupils cannot and will never be fitted for the duties of government which our Constitution commits to them. Our system of government cannot endure if a great number of its young citizens (20,000 now attending the Japanese language schools and many thousands to follow) are to have inculcated into their young minds fealty to the Emperor as well as the ideals and traditions of the country of their ancestors; in other words, it cannot endure half American and half Japanese. The future welfare, prosperity and well being of this territory depend largely upon its future citizenship, and the legislature should be allowed to prescribe reasonable qualifications to be possessed by persons who are to teach in either public or private schools in order to safeguard such future citizenship. That the right to teach a foreign language to pupils in a private school exists there is no doubt, but such right, however, is subject to the paramount right of the people to impose upon the engagement thereof any reasonable legislation the public welfare may require.

CITES HIGH AUTHORITY.

While the Nebraska case (*Meyer vs. Nebraska, supra*) is not decisive of this case, the Supreme Court of the United States, by its utterances, has indicated clearly to my mind in no uncertain terms that Act 36 should be sustained. It says:

"Practically, education of the young is only possible in schools conducted by specially qualified persons who devote themselves thereto. * * * That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear."

I am convinced that Act 36 is within the Fifth and Fourteenth Amendments of the Constitution of the United States; that it is regulatory and its requirements are reasonable and not arbitrary. Having decided that the act is the proper exercise of the police power of the legislature in such matters, it necessarily follows that it is not contrary to the provisions of the Treaty of Commerce and Navigation existing between the United States and Japan.

The application for a temporary injunction is therefore denied. An order to this effect will be signed upon its presentation.

Dated, Honolulu, Hawaii, September 27, 1923.

(Signed) FRANK ANDRADE,

First Judge, Circuit Court, First Judicial Circuit, Territory of Hawaii.

(Seal)

CHAPTER IV.—ASAKURA CASE (PAWNBROKER TEST CASE).

R. ASAKURA, Respondent, vs. THE CITY OF SEATTLE ET AL., Appellants.

IN THE WASHINGTON SUPREME COURT.

No. 16910. DEPT. 2. OCTOBER 24, 1922.

1. DECISION OF THE SUPREME COURT, STATE OF WASHINGTON.

Municipal Corporations (320)—Police Power—Regulation of Occupations—Pawnbrokers.

Constitutional Law (112, 114)—Class Legislation—Prohibition of Trade or Business—Pawnbrokers.

Treaties (2)—Construction—Right to "Carry on Trade"—Pawnbrokers—Rights of Aliens.

Appeal from a judgment of the superior court for King County, Frater, J., entered December 28, 1921, in favor of the plaintiff, in an action for an injunction, tried to the court. Reversed.

Walter F. Meier, and Charles Donworth, for appellants.

Guie & Halverstadt, for respondent.

Mackintosh, J. Has a city the power to provide by ordinance that every-one engaging in pawnbroking must be a citizen of the United States?

The answer to this question determines this litigation, which is an action begun by a subject of the Emperor of Japan seeking to enjoin the City of Seattle from arresting the respondent for pawnbroking.

An ordinance was enacted by the proper city authorities in July, 1921, providing for the licensing and regulating of the business of pawnbroking. One of the sections of this ordinance provides that no one shall engage in pawnbroking without a license. Another section specifies "that no such license shall be granted unless the applicant be a citizen of the United States," etc.

Respondent's complaint alleges that he is a Japanese subject, and has resided in Seattle for six years prior to July, 1921; that during such time he has been a pawnbroker, and alleges that the ordinance hereinabove referred to is invalid as being in violation of the provisions of section 3, of article I, of the state constitution, and section 1 of the Fourteenth Amendment to the Constitution of the United States, and in conflict with the treaty between the Governments of the United States and Japan.

A decree was entered in conformity with the prayer of respondent's complaint, from which the city has appealed.

At the threshold we are met with the necessity of determining whether pawnbroking is a business in which any individual has an inherent right to engage. If it is such, then, of course, the respondent is entitled to the remedy he seeks. Or is pawnbroking a privilege which may be absolutely denied to anyone or granted upon such terms and conditions and with such restrictions as the city may impose?

Certain lines of business activity have been from earliest times considered by the courts to contain elements which permit the restriction of those who may engage therein. Some of these elements have been the interference with the lives and property of the people generally,

and the jeopardy of the public health, safety and morals. The courts have held that no one has an inherent right to pursue such traffic, but that such activities may be permitted under such conditions as the sovereign exercising the police power may declare, and that the person enjoying such permission is exercising a privilege and not a right. Without hesitation, the courts have designated certain businesses as falling within the class of privileges. The elements will not differ in many of these occupations, and where they plainly may impair the public health, morals or safety, courts will be found unanimously upholding the placing of restrictions upon the class and character of persons who may be allowed to transact such businesses. Pawnbroking has not so often come before the courts for consideration, but we find that decisions conform to what is the general understanding of men in holding that pawnbroking is a business which is surrounded with some degree of menace to the public good. In certain of its aspects, pawnbroking may be harmless, but, on the other hand, it is common knowledge that, both on account of the nature of the business itself and somewhat on account of the character of those engaged in it, it offers a ready shelter for thievery, and to that extent encourages criminality. This aspect of the business has been recognized by both our state and city governments, for statutes and ordinances will be found which attempt to strictly regulate the manner in which pawnbroking may be conducted, and providing, among other things, for a constant and careful police inspection and control. So that, where the question as to the character of pawnbroking has arisen, we find the courts deciding that to be allowed to engage therein is a privilege and not an inherent right.

Probably as good an expression of this view as any is to be found in the case of *City of Grand Rapids vs. Braudy*, 105 Mich. 670, 64 N. W. 29, 55 Am. St. 472, 32 L. R. A. 116, where the supreme court of Michigan says:

"It is common knowledge that thieves resort to these places (pawnbrokers) to dispose of their stolen goods, and that unscrupulous, and oftentimes criminal, persons are engaged in the business. The business therefore comes expressly within the control of the police power of the state, and is properly subject to reasonable rules and regulations. A very clear abuse of this power must be shown in order to justify the court in declaring the regulations to be unreasonable and void. While this business is legitimate in the absence of any statute controlling it, no inalienable right exists to carry it on without complying with those provisions and restrictions which the legislative power of the state has seen fit to require * * *. The business is not necessary to the welfare of society or the public. The common council, with the knowledge of all the facts before them to a greater extent than the courts can possibly have, have determined that it is well, in their judgment, to require these conditions. While the exercise of any arbitrary power may seem harsh, still we are of the opinion that this requirement is not so unreasonable as to require the courts to declare it void."

Similar language is used by the supreme court of Virginia in *Elsner Bros. vs. Hawkins*, 113 Va. 47, 73 S. E. 479, Ann. Cas. 1913D 1278, as well as by the supreme court of California in *Levinson vs. Boas*, 150 Cal. 185, 88 Pac. 825, 12 L. R. A. (N. S.) 575, and in *City of St. Joseph vs. Levin*, 128 Mo. 588, 31 S. W. 101, 49 Am. St. 577, the supreme court of Missouri said:

"The city may not only regulate but suppress pawnbrokers, or refuse to license such occupation altogether. No person has the right to follow such occupation within the limits of said city without first obtaining a license from its authorities for that purpose, which may be granted or

withheld at pleasure. The business is a privilege, not a right, and he who avails himself of it and derives its benefits must bear its burdens and conform to the laws in force regulating the occupation, if not illegal."

The supreme court of this state, in *Seattle vs. Barto*, 31 Wash. 141, 71 Pac. 735, says this:

"It is not doubted that the business of pawnbroking is a proper subject of police regulation, nor is it doubted that it is within the province of the municipal authorities to make the business bear the costs of such regulation."

The supreme court of Indiana, in *Grossman vs. City of Indianapolis*, 173 Ind. 157, 88 N. E. 945, and the supreme court of Missouri in *City of St. Louis vs. Baskowitz*, 273 Mo. 543, 201 S. W. 870, in dealing with the conduct of junk shops (a business which in some aspects closely resembles that of pawnbroking), held similarly to the cases above cited.

Holding, then, that pawnbroking is a privilege and not a right, the question arises as to whether this privilege in the form of a license may be granted to citizens and refused to aliens. This question has also been before numerous courts, which have held that such distinction may properly be made for the reason that, being a privilege, it is liable to abuse resulting in public harm, and may therefore properly be confined to such persons as may reasonably be supposed to have a full sense of responsibility to the country and a desire for its welfare, and persons who are attached to the principles of the government and well disposed to its good order and happiness. The legislative department of the government having determined this matter, the courts will not interfere with its conclusions. This question has sometimes arisen in the control of the liquor traffic, wherein that activity has been confined to citizens of the United States. (*Bloomfield vs. State*, 86 Ohio 253, 99 N. E. 309, Ann. Cas. 1913D 629, 41 L. R. A. [N. S.] 726; *Trageser vs. Gray* 73 Md. 250, 20 Atl. 905, 25 Am. St. 587, 9 L. R. A. 780.) The rule also has been applied in ordinances regulating peddling. (*Commonwealth vs. Hana*, 195 Mass. 262, 81 N. E. 149, 122 Am. St. 251, 11 L. R. A. [N. S.] 799.) Granting the privilege of laboring upon public works (*People vs. Crane*, 214 N. Y. 154, 108 N. E. 427, Ann. Cas. 1915B 1254; *Crane vs. People of State of New York*, 239 U. S. 195), and the right to operate motor vehicles on public streets (*Morin vs. Nunan*, 91 N. J. L. 506, 103 Atl. 378). The supreme court of this state, in *State vs. Ames*, 47 Wash. 328, 92 Pac. 137, has held that the privilege of pilotage in the waters of the state could properly be limited to citizens.

This court, in the case of *State ex rel. Sayles vs. Superior Court*, 20 Wash. Dec. 62, 207 Pac. 966, has established the rule that a municipality could prohibit any business which was inherently vicious and harmful, and in effect has said that, in cases where the business is of such character, the city can say who shall and who shall not engage in it.

The case of *Yick Wo vs. Hopkins*, 118 U. S. 356 (commonly known as the Chinese Laundry Case), was one involving the attempt by the city to regulate a business which was not of itself harmful or injurious, and is on that account distinguishable from the case at bar, and is therefore of no controlling significance.

We find nothing, therefore, in the ordinance in conflict with federal or state constitutions.

Having determined these questions, there is presented the one as to whether the ordinance is in conflict with the treaty between the Governments of the United States and Japan, proclaimed April 5, 1911. Passing

the question of whether a treaty-making power can impair or destroy the police power of a sovereign state, we are content to rest our decision on this phase of the case upon the language of the treaty itself, which guarantees only to the subject of Japan, residing in the United States the right to "carry on trade" upon the same terms as our own citizens. The business of pawnbroking cannot be held to be a right to "carry on trade." The Supreme Court of the United States in *Patson v. Commonwealth of Pennsylvania*, 232 U. S. 138, and *Heim v. McCall*, 239 U. S. 175, Ann. Cas. 1917B 287, has held that equality of rights provisions in treaties do not include the privilege of game hunting or laboring on public works. So equality of opportunity to "trade" means only the pursuit of those callings in which an individual has an inherent right to engage. The treaty does not secure to an alien the right to exercise a privilege.

Pawnbroking being a business that the state in the exercise of its police power, and the city through its delegated right, may either absolutely prohibit or conditionally permit by means of a license, and the fact of alienage has been deemed sufficient ground for the refusal of a license, the courts will not sit in review of the action of the municipality, and will not reverse the action of the municipality, in the absence of unreasonableness akin to fraud; for municipal corporations are *prima facie* the sole judges respecting the reasonableness of such regulations and only in extreme cases will the courts interfere with the exercise of their judgment.

The action should have been dismissed, and the judgment of the lower court is reversed.

Parker, C. J., Holcomb, Main, and Hovey, J. J. concur.

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, 1923. No. 211.

2. APPELLANT'S BRIEF, BY GUIE & HALVERSTADT. STATEMENT OF THE CASE.

This is a writ of error to the supreme court of the State of Washington to review a judgment of that court which reversed a decree of the superior court of King County, Washington, perpetually restraining the defendants from enforcing Ordinance No. 42323, requiring all persons engaging in business as pawnbrokers to secure a license from the city so to do, and as a condition precedent, and providing that no license should be granted to anyone not a citizen of the United States, the plaintiff in error contending that the ordinance is unconstitutional and in violation of the treaty between the United States of America and the Empire of Japan, and of the due process and equal protection clauses of the Fourteenth Amendment. (Rec., pp. 1-6.)

THE BILL OF COMPLAINT.

The defendants in error are a municipal corporation, its comptroller and chief of police, respectively. The plaintiff in error is a subject of the Emperor of Japan, has been a resident of the City of Seattle continuously since 1904, having duly entered the United States and having complied with all acts of Congress and regulations relating to the entry of aliens into the confines of the United States. Since the month of July, 1915, the plaintiff in error has been continuously engaged in business as a pawnbroker in the City of Seattle, during all of which time he has complied with all laws and ordinances relating to or respecting his business, and has conducted his business honestly and in good faith. His place of business is in all respects a fit and suitable place for conducting such business and at all times has

been. He speaks, reads and writes the English language. The ordinance in question was approved on the 2nd day of June, 1921. It was passed for the sole purpose of preventing any alien from securing a license to engage in business as a pawnbroker in the city, and as a part and parcel of a plan on which the city had for more than a year prior to the commencement of the action been engaged of preventing subjects of the Emperor of Japan, lawfully residing in the United States and engaging in business in the City of Seattle, from being able to carry on or engage in business for which a license so to do was required by the city. The plaintiff in error did not apply to the city for a license to engage in business as a pawnbroker as required by the terms of the ordinance in question, because it would have been utterly useless for him so to do, and because the city would not receive from him an application for a license, which refusal was because of the ordinance in question; and the city would not grant the plaintiff a license to engage in business as a pawnbroker for the sole and only reason that he was a subject of the Emperor of Japan and not a citizen of the United States. On the 24th day of October, 1906, there was duly approved Ordinance No. 14,404, of the City of Seattle, repealed by the ordinance in question, and which did not discriminate against aliens. On the 9th day of August, 1920, the plaintiff in error duly made an application for a license to engage in business as a pawnbroker under and by virtue of the ordinance last mentioned, and for a renewal of his then license which had theretofore been granted to him by the city under such ordinance, such application being in due form and as required by the city and did all things required to be done by him for the making of such application, which application was duly referred to the license committee of the city council of the City of Seattle, which committee reported thereon recommending that the license be granted, but on the 23rd day of August, 1920, the city council refused to grant the license for the sole and only reason that plaintiff in error was a subject of the Emperor of Japan and despite the fact that he then was and at all times had been a fit and suitable person to have such license and to engage in such business, and despite the fact that his place of business then was and at all times heretofore had been a fit and suitable place in which to carry on such business. That in order to carry on the business of a pawnbroker successfully it is necessary that the same be done continuously and without interruption in order to maintain the good will of the business and the business itself. That the defendant comptroller has threatened to arrest the plaintiff in error because he is engaged in the business of pawnbroker without a license and will do so from day to day unless restrained by the court, and the defendant city will not permit him to have a license on the sole ground that he is a subject of the Emperor of Japan; that if arrests are made his business will be ruined and if the defendants are not enjoined from so doing they will arrest him from day to day and he will thereby suffer an irreparable damage. Plaintiff in error further alleged that at all times he has been and now is willing to comply with any valid ordinance of the city respecting his business and at all times has been ready and willing to pay the defendant city the license fee required by it for that purpose. The plaintiff in error prayed for a temporary restraining order, a temporary injunction and a perpetual injunction against the enforcement of the ordinance. (Rec., pp. 1-6.)

TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION.

On the filing of the bill of complaint, a temporary restraining order was issued, as prayed for, and, upon the hearing of an order to show cause, a temporary injunction was granted accordingly. (Rec., pp. 6-10.)

THE ANSWER.

The defendants in error by answer admitted the capacity of the parties as alleged, the passage and approval of the two ordinances alleged; that the plaintiff in error had been engaged in business as alleged; that he had not applied for a license and that the defendant comptroller intended to make an arrest as alleged, but denied all other allegations in the complaint. (Rec., p. 33.)

The ordinance questioned is found on pages 26-32 of the Record. It is sufficient to call attention to the fact that, by its terms, a license must be secured from the city to engage in the business as pawnbroker and that the following provision appears in section 6:

"Provided, however, that no such license shall be issued unless the applicant be a citizen of the United States. * * *"

Ordinance No. 14,404, mentioned in the bill, was repealed by the ordinance in question. It contained no provision making citizenship a condition precedent to a license.

THE TRIAL.

On the trial of the action the plaintiff testified that he came to Seattle in 1904 direct from Japan; that he is of Japanese parentage; that he arrived at Vancouver, B. C., and, in coming to Seattle, complied with all the requests of the Immigration Department; that he has lived in the United States continuously; that he is a pawnbroker and watchmaker and has been so engaged since the year 1915, occupying but one location; he had never been arrested; the police officers examined his books as they do all other pawnbrokers; he makes all reports required by the ordinance relating to pawnbrokers and all required by the police department; he reads and speaks the English language; he began business with \$1000.00 invested capital and has now a \$5000.00 investment; if he were compelled to go out of business, even temporarily, his trade would go elsewhere; there has never been any complaint as to his location. (Rec., 13-16.)

The court refused to permit the plaintiff to show that, under a prior ordinance, the plaintiff has been denied a license wholly because he was a subject of the Emperor of Japan, and refused to permit the plaintiff to show that the ordinance in question was passed for the purpose of preventing Japanese from securing licenses to engage in business as pawnbrokers. (Rec., 16-20.)

The trial court entered a decree adjudging the ordinance to be in violation of the due process and equal protection clauses of the Fourteenth Amendment and enjoined the defendants from enforcing the ordinance against the plaintiff in error until such time as the city should grant him a license. On appeal to the supreme court of the state, that court held, first, that the business of a pawnbroker was a privilege only and could be prohibited to all persons, and second, that the plaintiff in error was not protected by the due process and equal protection clauses of the Fourteenth Amendment or by the treaty between the United States and Japan.

SPECIFICATIONS OF ERROR.

The assignments of error appear on pages 41-42 of the Record. They allege that the court erred in holding the ordinance constitutional and not in violation of the due process and equal protection clause of the Fourteenth Amendment and of the treaty between the United States and the Empire of Japan.

PROPOSITIONS DISCUSSED.

The propositions we desire to discuss are:

1. A business, occupation or calling cannot be prohibited by a state legis-

lature unless there is *inherent* in the business, occupation or calling itself, irrespective of the character of some men who may engage in it, some evil or direct tendency to evil.

2. The business of pawnbroker is lawful and legitimate and cannot be prohibited by the legislature.

3. The city cannot decline to grant a license to the plaintiff in error merely because he is a subject of the Emperor of Japan.

4. The treaty does not permit of the refusal of the city to grant the plaintiff in error the license in question.

A business, occupation or calling cannot be prohibited by a state legislature unless there is inherent in the business, occupation or calling itself, irrespective of the character of some men who may engage in it, some evil or direct tendency to evil.

An argument has been made to the effect that engaging in business as a pawnbroker is a privilege and not a right and that, therefore, the city may say to one man that he may and to another that he may not engage in the business and enforce its mandate by criminal prosecution. The argument of privilege is based on the contention that thieves frequently resort to pawnbrokers to sell stolen articles, and that by reason of such practice the city has a right to prohibit all men from engaging in business as pawnbrokers. It is believed that the argument seriously mistakes the limit of the right of prohibition and confounds that right with the right of mere regulation under the police power. It is believed that the opinion of the supreme court proceeds upon the theory that, under police power, the city has the right to regulate the business, and, having the power of regulation, it necessarily follows that it has the power of prohibition. No greater fallacy could be suggested. Every business, every profession and every calling is subject to the police power, but the power to regulate is not always the power to prohibit. The state, under its police power, may regulate the business of a warehouseman and require the taking out of a license as a condition precedent to engaging in that business, but cannot prohibit the business. (*Cargill Company vs. Minnesota*, 180 U. S. 452, 468.)

The state, under the police power, may require an employment agent to take out a license as a condition precedent to engaging in the employment business. (*Brazee vs. Michigan*, 241 U. S. 340.)

But the state cannot proscribe and prohibit the employment business. (*Adams vs. Tanner*, 244 U. S. 590.)

The rule is that businesses or occupations may be prohibited when, and only when, there is inherently in the businesses, occupations or callings, themselves, without regard to the men or character of men who at times engage in them, a menace to the public welfare, or a tendency to that which is harmful. This rule is well illustrated by the cases from this court as shown by the following subjects:

Lotteries were prohibited constitutionally by the states, not only because they were a form of gambling, but because the inevitable tendency was to impoverish the public. (*Phelan vs. Virginia*, 8 Howard 163.)

In that case the court said:

"The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

The manufacture and sale of intoxicating liquors can be lawfully prohibited by the states because of the inherent nature of intoxicating liquor, its effects upon those using it to excess, and the attendant effects upon the public at large. (*Mugler vs. Kansas*, 123 U. S. 623, 662; *Crowley vs. Christensen*, 137 U. S. 86, 90.)

In the latter case the court said:

"There is in this position an assumption of a fact which does not exist, that when liquors are taken in excess the injuries are confined to the party offending: The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may licenses be exacted from the keeper of a saloon before a glass of his liquors can be disposed of, but restrictions may be imposed as to the class to whom they may be sold, and the hours of the day, and the days of the week, on which they may be sold. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no *inherent* right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of a state or a citizen of the United States. As it is a *business* attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulations rests in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state, or one which can be brought under the cognizance of the courts of the United States."

Cigarettes may be prohibited, not only as to manufacture, but as to use, by the state because of their inherent effect upon the users.

In the case of *Austin vs. Tennessee*, 179 U. S. 343, 361, the court said:

"There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a state, with reference to its own people, to declare, under penalties, that a cigarette should not be manufactured within its limits. No one could say that such legislation trenched upon the liberty of the citizen by preventing him from pursuing a lawful business."

The act of Congress prohibiting the transportation of lottery tickets in interstate commerce was upheld by this court for the same reason, in the case of *Champion vs. Ames*, 188 U. S. 321, 355, where the court said:

"In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the *nature* of the

interstate traffic which it was sought by the Act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phelan vs. Virginia*, 8 How. 163, 168, 12 L. Ed. 1030, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: 'Experience has shown that the common forms of gambling are comparatively innocuous when placed in contact with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple' * * *.

"If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that *inhere* in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? * * * We have said that the liberty protected by the Constitution embraces the right to be free in the enjoyment of one's faculties; 'to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper.' (*Allgeyer vs. Louisiana*, 165 U. S. 578, 589, 41 L. Ed. 832, 835, 17 Sup. Ct. Rep. 426, 531.) But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals."

It must be remembered that the power of Congress over interstate commerce is nothing more or less than a grant of police power by the states to Congress over that particular subject, and that the power to regulate manifests itself in precisely the same ways as does the police power when exercised by the states, that is, in the matter of prohibition of certain things and regulation of others.

The purchase and sale of commodities on margins can be constitutionally prohibited by the legislature because of the tendency to gambling, even though the act is broad enough to prohibit all such transactions, including those in which there is no element of gambling whatever. (*Otis & Gassman vs. Parker*, 187 U. S. 606.)

In that case the court said:

"We cannot say that there might not be conditions of public delirium in which at least a temporary prohibition of sales on margin would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. *Of course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay except that he has had the chances of a bet.* There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the constitution was adopted, the whole people were buying mining stocks in this way, with the result of *infinite disaster.*"

The direct statement by this court is found in the case of *Murphy vs. California*, 225 U. S. 623, where the court said:

"The Fourteenth Amendment protects the citizen in his right to engage in any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is *inherently* vicious and harmful."

The manufacture of oleomargarine may be constitutionally prohibited by the state because of the tendency of oleomargarine to deceive the public. (*McCray vs. United States*, 195 U. S. 27, 63.)

In that case this court said:

"As we have said, it has been conclusively settled by this court that the tendency of that *article* to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely *prohibit* the manufacture of the article."

The use of trading stamps can be prohibited for the same reason. (*Rast vs. Van Deman*, 240 U. S. 342, 364.)

In that case this court said:

"But there may be partial or total dispute of the propositions. *And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone, and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities.* As to all of which not courts, but legislatures, may be the best judges, and, it may be, the conclusive judges." * * *

"The *schemes* of complaints have no such directness and effect. They rely upon something else than the article sold. They attempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an *appeal* to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called gambling; it may, however, be considered as having the seduction and evil of such, and whether it has may be a matter of inquiry—a matter of inquiry and of judgment that it is finally within the power of the legislature to make."

The above rule was reiterated by this court in the case of *Tanner vs. Little*, 240 U. S. 368, 384, where the court said:

"However, a decisive answer to the question need not be given, for we have said, in *Rast vs. Van Deman & L. Co.*, that the 'premium system' is not one of advertising merely. It has other, and, it may be, deleterious, consequences. It does not terminate with the bringing together of seller and buyer, the profit of one and the desire of the other satisfied, the article bought and its price being equivalents. It is not so limited in its purpose or effect."

The principle was stated a great deal more explicitly by this court in the case of *Clark Distilling Co. vs. Western Maryland R. Co.*, 242 U. S. 311, 322, where it is said:

"Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, therefore destroys the Constitution. *The want of force in the suggested inconvenience becomes patent by considering the principle which, after all, dominates and controls the question here pre-*

sented; that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the Constitution but for the *enlarged right* possessed by Government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that Government might exert an enlarged power as to subjects to which, under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace."

Again, in the case of *Wilson vs. New*, 243 U. S. 32, 346, it is said:

"It is equally certain that where a particular subject is within such authority, the *extent* of regulation depends on the nature and *character* of the *subject* and what is appropriate to its regulation. The powers possessed by government to deal with a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to *liquor* and that which may be exercised as to *flour, dry goods and other commodities*. It is shown by the settled doctrine sustaining the right by regulation absolutely to prohibit *lottery tickets*, and by the obvious consideration that such right to prohibit could not be applied to *pig iron, steel rails or most of the vast body of commodities*."

Again, in *Adams vs. Tanner*, 245 U. S. 590, this court, in holding that the employment agency business could not be prohibited, said:

"But we think it plain that there is nothing *inherently* immoral or dangerous to the public welfare in acting as paid representative of another to find a position in which he can earn an honest living."

Some ministers of the Gospel have violated not only the moral but the statutory law as well and are serving terms in prison; some grocers have put sand in the sugar, and sold as pure, adulterated articles, and have sold short weight; some dairymen have put water in milk and sold it as milk; some tradesmen have sold articles under misrepresentation as to quality; some employment agents have been thoroughly dishonest and criminal in their business; some bankers have stolen depositors' funds; and in every walk of life, in every business, in every occupation, can be found engaged dishonest and unscrupulous men; but no one has yet successfully contended that lawful occupations can be damned to every honest man by reason of the dishonesty of a few. The same argument is made to sustain this ordinance as was made to sustain Initiative No. 8, of this state, which prohibited any employment agent from charging a fee, reward or compensation for securing employment for anyone or for furnishing information leading thereto, and the state court listened with approval to the argument. (*Huntworth vs. Tanner*, 87 Wash. 670; *State vs. Rossman*, 93 Wash. 530.)

But those decisions were contrary to the Constitution of the United States. (*Adams vs. Tanner*, 244 U. S. 590.)

In that case this court, in holding that the employment agency business could not be prohibited to all men by reason of the dishonesty and abuses which sometimes occurred in it, said:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a

distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practice; and as to every one of them, no doubt, some can be found ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

That there may be no mistake as to the extent to which arguments similar to that made by the defendants in error was made in favor of Initiative No. 8, we invite this court's attention to the vigorous dissenting opinion of Mr. Justice Brandeis, in the case last cited.

There must, of course, be a limit to the power of legislative prohibition. Necessarily that limit must be fixed. If the test be not found in the inherent characteristics or nature of the act in question, then there is no test, but the limit of legislative action is dependent, in the final analysis, upon the personnel of this court, and conceivably what would be an inherent right, beyond legislative prohibition at one time, might, by reason of nothing more than a change in the membership of this court, become a privilege merely, and subject to legislative prohibition. It seems impossible to believe that what we have been wont to regard as constitutional rights are not fixed and are not beyond the changing views of men, and that what is a constitutional right today conceivably may not be such tomorrow, although the Constitution may not have been amended.

It is, therefore, confidently submitted that the right to prohibit must be found in the inherent nature or characteristic of the business at which the legislative act is directed.

The business of pawnbroker is lawful and the legislature cannot prohibit any honest man from engaging therein.

The business of pawnbroker, both as defined in section 3 of the ordinance and as it is commonly understood, is merely the loaning money on pledged personal property, the physical custody of which is actually delivered to and held by the pledge until payment. The loaning of money has become so general that if it were suddenly stopped the business of the world would immediately cease with it, in which event the large financial centers of the United States would be in absolute panic. There is nothing inherently wrong in the borrowing of money or in the loaning of it. No one even so contends. One of the most common practices is the giving of security for the loan, and indeed the amount of money borrowed without security is comparatively small. The very large part of money borrowed is on pledge of collateral. As a matter of fact, and law, it is immaterial whether the collateral is a bond or physical property. In either event the pledged property stands as a guarantee of payment and the borrower has secured the sum he desires to borrow and the lender has loaned the amount he desires to lend. Of course, it cannot be seriously asserted that the pledge of collateral security to a bank or a money loaning institution is lawful and legitimate, and has no evil tendencies, inherent in the transaction, but that a loan from a pawnbroker and the pledging of physical personal property with him as security for the payment is not legitimate and is not lawful and does have in it inherently tendencies to evil. The one is just as lawful and just as legitimate as the other and equally free from any inherent evil or tendency to evil, and no amount of argument can change this self-evident fact. It is said that thieves sometimes resort to dishonest

pawnbrokers for the purpose of disposing of stolen property. What of it? Does one dishonest pawnbroker have it in his power to damn the business to all honest men? Is it not a question of the personality of the pawnbroker in the final analysis, and does anything but the personality of the pawnbroker have anything whatever to do with the question whether the business is carried on honestly or dishonestly?

Nor can it justly be said that the business is such that it cannot be carried on honestly, nor, in the great majority of cases, that it is not carried on honestly. Of course, there are dishonest men in that business as well as in every other known business, but that is no reason for prohibiting the business to all honest men. The assumption, or the fact if it be fact, that the business offers temptation to an honest man to practice dishonesty does not justify legislative prohibition of the business. The temptations surrounding an employment agent are forcibly stated in the dissenting opinion of Mr. Justice Brandeis in the case of *Adams vs. Tanner*, 244 U. S. 500, but they are not grounds for prohibiting the business.

Nor can it be said that the pawnbroker does not furnish needed service. It is so unnecessary to go into detail as to the service that he does furnish, and the needy people to whom that service is furnished, that we shall not burden the court with a detailed statement of it. The fact is entirely obvious. Suffice it to say that but for the service he furnishes, many needy people would be without the necessities of life, on those occasions when misfortune or adversity overtakes them.

The action of the city itself forecloses it from contending that the business of a pawnbroker is not a lawful business. Subdivision 33 of section 8966 of Remington's Compiled Statutes is as follows:

"Any such city shall have power—

"33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same: Provided, that no license shall be granted to continue for longer than one year from the date thereof."

If the business is not lawful the city cannot license it. The city, however, is asserting the power to license the business, and it thereby is foreclosed from contending that the business itself is not lawful. Furthermore, the business is recognized as lawful by the statutes of the state. (Remington's Compiled Statutes, secs. 2481-2488.)

Judge Mackintosh, speaking for the court, said:

"In certain of its aspects, pawnbroking may be harmless, but, on the other hand, it is common knowledge that both on account of the nature of the business itself and somewhat on account of the character of those who engage in it, it offers a ready shelter for thievery, and to that extent encourages criminality."

If dishonest men have engaged in the business of pawnbroking, the function of government is to see that those men do not secure the necessary license to engage in the business, and not by one act to attempt to abolish the business. We find ourselves utterly unable to agree with the learned court that "the nature of the business itself" offers a ready shelter for thievery and that it encourages criminality, and we do not believe that any fact can be put forward in justification of that statement. There is no justification for blaming a business or a calling for the dishonesty of a few men who engage in it, to the detriment and absolute loss of many honest men who have invested their money in the same kind of business. The power of government extends to prohibiting dishonest men from engaging in business, and not prohibiting business to all honest men. The argument

which is made to sustain this ordinance incontrovertibly leads to the conclusion that if any dishonesty occurred in any business thereby is furnished justification for the legislature to abolish the business. Not all courts are in accord with the supreme court of Washington. In the case of *Louisiana vs. Ipzzovitch*, 49 La. 366, the court, in speaking of the business of pawnbroker, said:

"The occupations attempted to be regulated are legitimate occupations, licensed by the state, and the city can impose no burden upon the carrying on of these occupations not authorized by the legislature."

In the case of *Butte vs. Paltrovich*, 39 Mont. 18, the court, speaking of the same business, said:

"The mere fact that appellant's business is legitimate and specially recognized as such by legislative enactment, does not render ineffectual the power conferred by subdivision 16 above."

Section 16 of the statute authorized the town council to license, among other occupations, pawnbrokers. In the case of *Grand Rapids vs. Braudy*, 105 Mich. 670, the question before the court was whether the legislative authority had power to require a license as a condition precedent to engaging in business as a pawnbroker. It makes no difference what the business in question is, the legislature has the power to require anyone desiring to engage therein to take out a license so to do.

In *St. Joseph vs. Levin*, 128 Mo. 588, the question before the court was whether a city could compel pawnbrokers to keep a book and enter therein a list of pledges and descriptions thereof. It is so fundamental that such a record can be required under the police power that the question whether the business was a privilege or a right could not possibly have been involved in the case.

In the case of *Elsner Bros. vs. Hopkins*, 113 Va. 47, the question was as to the validity of an ordinance making it unlawful for pawnbrokers to sell firearms. The right to limit the sale of firearms by anyone, whether a pawnbroker or not, is recognized everywhere.

In *Grossman vs. Indianapolis*, 173 Ind. 157, the question was whether an ordinance requiring junk dealers to take out licenses was valid and the same question was before the court in *St. Louis vs. Baskowitz*, 201 S. W. 870. The right under police power to require anyone in whatever occupation to take out a license is fundamental.

In *Levinson vs. Boas*, 150 Cal. 185, the question before the court was whether one who borrowed money from a man who was in fact a pawnbroker, but who had failed to take out a license, could be compelled to repay the money, or whether the failure to take out a license as a pawnbroker made the contract void.

In the case of *Wood vs. Krepps*, 168 Cal. 382, the court, speaking of the business of pawnbroker, said:

"There is no law in the state making the business of loaning money on personal property illegal. It is a legitimate branch of commercial business which the state has only regulated to the extent of fixing the maximum rate of interest. The business itself, however, is not affected. It is neither *malum in se* nor *malum prohibitum* * * *. There is nothing on our statute which says that it is unlawful to follow the business of loaning money at interest. Such business is not *malum in se* nor is it *malum prohibitum*."

It is believed that the business of a pawnbroker is not, in effect, different from that of buying and selling second-hand goods or second-hand personal property. We cannot believe that the legislature could prohibit all persons from engaging in the business of buying and selling second-hand personal

property, merely because of the fact, if it be a fact, that there are men engaged in the business who carry it on by dishonest means, and who connive with thieves for the purpose of aiding them in disposing of stolen property. It would be a strange doctrine if, under the Fourteenth Amendment, an honest man could not engage in a business free from inherent tendencies to evil, because of the fact that such character of business had been used by dishonest men for the accomplishment of criminal ends.

No dishonest man has any constitutional right to engage in any business or occupation in which the public is exploited by means of his dishonesty. Nor would anyone seriously question the right of the legislature to adopt such reasonable measures as would make it impossible for dishonest men to engage in any business which might be used for the purpose of cheating or defrauding the public, or for the purpose of accomplishing dishonest transactions. In fact, the legislature at all times possesses the right, if it deems it necessary, to require everyone to secure a license to engage in any kind of business in which dishonest practices may be indulged, and by means of a licensing system, make it impossible for dishonest men to engage in such businesses or callings as afford them means to practice dishonesty.

In the case of *State vs. Bowen & Co.*, 86 Wash. 23, 28, the supreme court of the State of Washington, holding an act requiring commission men, that is men engaged in the business of receiving and selling farm and garden produce on commission, to take out a license as a condition precedent so to do, said:

"The particular business here sought to be regulated is, of course, a legitimate and, in many respects, a necessary and important business. The business of producing farm, garden, orchard, and dairy products is one of the most important industries of the state. The producer cannot ordinarily be both producer and marketer. The legislature seems to have found that there exists a class of factors or merchants whose principal business is that of selling such produce on commission, and that certain abuses have grown up in that business; so, to provide regulation and prevent such abuses, the act in question was passed."

Of course, no one would seriously contend that representing another, in the receipt and sale of garden and farm produce, as his agent, honestly, is not a constitutional right. Yet this court held that a license might be required so to do, even in that class of business. (*Payne vs. Kansas*, 248 U. S. 112.)

The same may be said of the business of an employment agent. (*Spokane vs. Macho*, 51 Wash. 322; *Brazee vs. Michigan*, 241 U. S. 340; *Adams vs. Tanner*, 244 U. S. 590.)

In neither case can the legislature prohibit the business, but in either case it may enact a licensing system by means of which dishonest men can be kept out of the business and dishonest practices prevented. Hence, we submit, that the power of the legislature, with respect to the business of a pawnbroker, extends no further than to require a license, for the purpose of keeping dishonest men out of the business, and preventing dishonest practices therein, and that in no event can the legislature prohibit the business to honest men.

The city cannot decline to grant a license to the plaintiff in error merely because he is a subject of the Emperor of Japan.

Excepting (1) the right of the state to prohibit the ownership of lands within its border, there being no treaty to the contrary (*Chirac vs. Chirac*, 2 Wheat, 259, 272; *Hauenstein vs. Lyman*, 199 U. S. 483, 484; *DeVaughn vs. Hutchinson*, 165 U. S. 565; *Clarke vs. Clarke*, 178 U. S. 186; *Blythe vs.*

Blythe, 180 U. S. 333; *Terrace vs. Thompson*, decided Nov. 12, 1923); (2) the right of the state to limit the right to take the common property of the state, such as game and fish, to citizens of the state (*McCready vs. Virginia*, 94 U. S. 391; *Patson vs. Pennsylvania*, 232 U. S. 138); (3) the right of the state, and (there being no statute to the contrary) of any municipality therein to employ none but citizens on public work (*Atkin vs. Kansas*, 191 U. S. 207; *Heim vs. McCall*, 239 U. S. 173); and (4) the power to limit the right of the franchise to citizens of the state (*Yick Wo vs. Hopkins*, 118 U. S. 336, 370); aliens are within the equal protection clause as fully as citizens.

Ex parte Virginia, 100 U. S. 339, 345; *Yick Wo vs. Hopkins*, 118 U. S. 356, 359; *Fong Yuc King vs. United States*, 149 U. S. 698, 724; *Wong Wing vs. United States*, 163 U. S. 228, 242; *United States vs. Wong Kim Ark*, 169 U. S. 649, 694; *American Sugar Refining Co. vs. Louisiana*, 179 U. S. 694; *Truax vs. Raich*, 239 U. S. 33; *Buchanan vs. Warley*, 245 U. S. 60, 76; *Re Tiburcio Parrott*, 1 Fed. 481; *Ah Kow vs. Nunan*, 5 Sawy. 552; *Re Ah Fong*, 3 Sawy. 144; *State vs. Montgomery*, 94 Me. 192; *Templar vs. Board*, 131 Mich. 254; *Re Opinion of Justices*, 207 Mass. 601; *Commonwealth vs. Titcomb*, 229 Mass. 14; *McKnight vs. Hodge*, 55 Wash. 289, 292.

In the case of *Yick Wo vs. Hopkins*, 118 U. S. 356, 359, this court said:

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are *universal* in their application, to all persons within the territorial jurisdiction without regard to any difference of *race*, *color* or of *nationality*; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that, 'All persons within the jurisdiction of the United States shall have the right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of *every citizen* of the United States *equally* with those of the strangers and *aliens* who now invoke the jurisdiction of the court.

In the case of *American Sugar Refining Company vs. Louisiana*, 179 U. S. 89, 92, this court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon differences of color, *race*, *nativity*, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemptions would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

In the case of *Truax vs. Raich*, 239 U. S. 33, 39, this court said:

"Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description, 'any person within its jurisdiction', as has frequently been held, includes aliens. 'These provisions', said the court in *Yick Wo vs. Hopkins*, 118 U. S. 356, 369 (referring to the due process and equal protection clauses

of the amendment), 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'

In *State vs. Montgomery*, 94 Me. 192, the court held unconstitutional an act requiring all peddlers to secure a license, and denying a license to an alien, and in so doing said:

"Nor can this discrimination be sustained as a constitutional exercise of the police power of the state. It must be noted that the discrimination is not against a class, as criminals, as paupers, as intemperates and disqualified by character or habits, or as harmful to society, but as against a class solely as aliens. Such a discrimination is forbidden."

In *Templar vs. Board*, 131 Mich. 254, the court held unconstitutional an act which required barbers to take out a license, but which denied a license to aliens. In its opinion the court said:

"But had it (the board) the right to require citizenship? If it had the right to couple that with other requirements, it would have the right to make that the only requirement."

In *Re Opinion of Justices*, 207 Mass. 601, the legislature submitted to the court the following inquiry:

"If the legislature is of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the constitutional power of the legislature to enact a law making it a criminal offense for any woman under the age of 21 years to enter a hotel or restaurant conducted by Chinese or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of 21 years or to serve her with food or drink therein?"

The court quoted from *Powell vs. Pennsylvania*, 127 U. S. 678; *Yick Wo vs. Hopkins*, 118 U. S. 356, and *Barbier vs. Connolly*, 113 U. S. 27, and cited with approval *Re Tiburcio Parrott*, 6 Sawy. 349, 1 Fed. 481, and *Re Lee Sing*, 45 Fed. 359, and then said:

"The business of keeping a hotel or restaurant, to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by any person of a particular nationality, which is not put upon it when it is carried on by any person of any other race and nationality. By the strict terms of the proposed law it would be criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she were under the age of 21 years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served food or drink therein. This is a very great interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the proscribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which others enjoy and interferes with their right to carry on business, acquire property and earn a livelihood, and denies them the protection of equal law.

"The only question that can be regarded as doubtful by anybody is that

which arises on the supposition that the legislature may be 'of the opinion that public order, decency and morality requires that girls and young women be excluded from Chinese restaurants and hotels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. The proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. The legislation does not refer to the character of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of a young woman into a hotel or restaurant kept by an American, which it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of other nationality.

"In reference to classifications made in an attempted exercise of the police power, Mr. Justice Brewer said, in *Gulf, Colorado & Santa Fe Railway vs. Ellis*, 165 U. S. 150, 165: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is based upon some reasonable ground—some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection.' See also opinion by Mr. Justice Field in *Ho Ahow vs. Hunan*, 5 Sawy. 552, Fed. Cas. No. 6, 546.

"The fact that a man is white, or black, or yellow is not a just constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of different color.

"We answer the question in the negative."

In the case of *Commonwealth vs. Titcomb*, 229 Mass. 14, the court said:

"It (the legislature) cannot proscribe one class upon the basis of race."

In view of the foregoing authorities, it is submitted that, subject to the exceptions above mentioned, aliens are within the equal protection clause of the Fourteenth Amendment as fully as citizens, that legislation imposing burdens upon, or limiting rights of, aliens, because of alienage, is void, and that however broad the power of classification may be, classification based upon citizenship as against alienage, or, upon alienage as against citizenship, is void.

Again, the plaintiff in error has the right to engage in business as a pawnbroker by the express terms of section 1977 of the Revised Statutes of the United States, which reads as follows:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to

sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens and be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Aliens are included within the foregoing statute. (*Yick Wo vs. Hopkins*, 118 U. S. 356, 369; *United States vs. Wong Kim Ark*, 169 U. S. 648, 695; *Whitefield vs. Hanges*, 222 Fed. 745.)

Nothing said by this court in the case of *Terrace vs. Thompson*, decided November 12, 1923, is in conflict with the foregoing. It must be remembered that the question before the court in that case was the right of the state to prohibit aliens from owning or leasing real estate within the limits of the state, and that general language in an opinion must be restrained to the particular facts before the court. (*Cohen vs. Virginia*, 6 Wheat. 264, 399; *United States vs. Wong Kim Ark*, 169 U. S. 649, 678; *Reinman vs. Little Rock*, 237 U. S. 171, 179; *Bailey vs. Baker Ice Machine Co.*, 239 U. S. 272.)

Speaking of the right of the city council to grant a pawnbroker's license to a citizen and deny one to an alien, the learned judge, speaking for the supreme court of Washington, said:

"This question has also been before numerous courts, which have held that such distinction may properly be made for the reason that, being a privilege, it is liable to abuse, resulting in public harm, and may therefore properly be confined to such persons as may reasonably be supposed to have a full sense of responsibility to the country and desire for its welfare, and persons who are attached to the principles of the Government and well disposed to its good order and happiness. The legislative department of the Government having determined this matter, the courts will not interfere with its conclusion." (Rec., p. 38.)

The foregoing is a statement to the effect that the city council may assume, without more, that aliens cannot be and are not attached to the principles of his Government and well disposed to its good order and happiness, and that they have no full sense of responsibility to this country, and do not desire its welfare and hence classification on the basis of alienage is upheld. This then follows: The legislature, having the power to require a license as a condition precedent to engage in any and every kind of business, may arbitrarily refuse to issue such license to any and every alien, merely because he is an alien. There is no escape from this obvious conclusion. Therefore, the equal protection afforded to aliens by the Fourteenth Amendment and the rights guaranteed to them by section 1977 of the Revised Statutes of the United States each is a myth. We apprehend that the asserted power to deny to aliens within the jurisdiction of the United States the rights guaranteed to them by the Fourteenth Amendment will not be acquiesced in by this court.

In *Cummings vs. Missouri*, 4 Wall. 327, this court said:

"To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition."

Of course, a Japanese cannot be admitted to citizenship. Therefore, the ordinance makes the right dependent upon an impossible condition, and the right is denied to the plaintiff in error under any condition and the plaintiff in error, whatever his character, whatever his honesty, whatever his integrity, whatever his respect for American institutions and laws, cannot secure a license, because of a classification based wholly on alienage, and which affords no ground for determining the presence or absence of those characteristics which justify the city council in denying a license. The vice of

this ordinance is found in the fact that, under the guise of the police power which justifies the city in prohibiting dishonest men from engaging in the business and prohibiting dishonest practices therein by dishonest men who may secure a license, an arbitrary rule is enacted which does not even approximate a practical method of determining the facts which are lawfully reposed in the city council.

Game and fish are the property of the state, are within the plenary power of the legislature, and their killing or taking may be prohibited to all persons who are not citizens of the state. (*McCready vs. Virginia*, 94 U. S. 395; *Geer vs. Connecticut*, 161 U. S. 519; *Manchester vs. Massachusetts*, 139 U. S. 240; *Ex rel. Silz vs. Hesterberg*, 211 U. S. 31; *Patson vs. Pennsylvania*, 232 U. S. 138.)

Therefore, if, with respect to that common property of the state, the legislature may not, consistent with the equal protection clause of the Fourteenth Amendment, prohibit a taking by resident aliens while permitting it by citizens, there can be no escape from the conclusion that the legislature, when dealing not with its own property, but with property rights of the inhabitants of the state, cannot discriminate against aliens in favor of citizens.

In *Re Ah Chong*, 6 Sawy. 45, 2 Fed. 733, Judge Sawyer held in violation of the equal protection clause of the Fourteenth Amendment, and the treaty with China, a statute of California prohibiting all aliens *incapable of becoming electors of the state* from fishing in the waters of the state. In his opinion, that eminent justice said:

"Citizens of other states having no property right which entitles them to fish against the will of the state *a fortiori*, the alien, from whatever country he may come, has none whatever in the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum* without price, charge, let or hindrance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nations,' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation.' And such discriminations are in violation of articles V and VI of the treaty with China cited in full in Parrot's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privileges it must permit all others to enjoy, upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

"The Fourteenth Amendment of the National Constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the equal protection of the laws.' To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains and penalties

than those to which others are subjected and it is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution."

The foregoing case has been cited with approval in the following cases: *County of San Mateo vs. Southern Pacific Ry. Co.*, 15 Fed. 722; *United States vs. Balsara*, 180 Fed. 694; *Re Takai Maru*, 190 Fed. 45; *Raich vs. Truax*, 219 Fed. 273; *Tragresser vs. Gray*, 73 Md. 251; *Commonwealth vs. Cosick*, 36 Pa. County Court Reports, 637.

In the case of *Harper vs. Galloway*, 58 Fla. 255, the court held in violation of the equal protection clause an act of Florida requiring residents of the state who were not residents of Marion County therein to give notice of an intention to hunt, and the payment of a special license tax for the privilege of hunting in Marion County, but requiring no notice or license tax from residents of Marion County, and in so doing said:

"The unjust discrimination against residents of other counties in the state who have rights as to the game in the state, as imposed by section 8 of the act, is in effect a denial to the residents of the state who are not residents of Marion County the equal protection of the laws of the land and such section 8 is inoperative as to residents of this state."

In the case of *State vs. Savage*, 96 Ore. 53, the supreme court of Oregon held two acts of the legislature of that state, prohibiting the taking of salt water crabs from Coos County for the purpose of sale, and making it inapplicable to those engaged in the canning business, to be discriminatory class legislation and void under article 1, section 20, of the state constitution, reading as follows:

"No law shall be passed granting to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

In its opinion the court said:

"No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos County, while another class of persons operating canneries should have the exclusive right of taking and shipping the same kind of fish beyond the limits of the country for the purposes of sale. The Act of 1915 and that of 1917 clearly grants a special privilege or monopoly to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation and repugnant to article I, sec. 20, of the constitution and void."

In *Poon vs. Miller* (Tex.), 234 S. W. 573, the court held invalid an act to secure a license to engage in the business of selling at wholesale fish and oysters, and providing that no person could procure such license without swearing that he was a citizen of the United States or a naturalized alien. The action was by a Chinaman to enforce a provision in a contract made with him by the defendants to the effect that they would not engage in the fish and poultry business within certain territory for a certain time. One defense set up was that the plaintiff could not prevail because he had not secured and could not secure a license under the act in question. The court held against the defendants and said:

"The state may have the power to regulate the sale of property belonging to the citizen or resident which has become a part of the commerce of the country, but cannot absolutely prohibit such sale in the face of the Federal Constitution, by an alien who has the same rights guaranteed to him as has the citizen. * * *

"We conclude that the provision of the statute denying this right to an alien to whom has been given all the rights of citizens of the most favored countries is in conflict with the treaty between the United States and China,

and also is obnoxious to the provisions of the Fourteenth Amendment to the Constitution, and is of no force and effect."

Although there does not appear a direct statement that the Chinese whose rights were infringed by the ordinance involved in *Yick Wo vs. Hopkins*, 118 U. S. 356, were all engaged in the hand laundry business as distinguished from steam laundry business, the opinion clearly indicates that to be the fact, and we submit that this court will take judicial notice of that notorious fact. In that case this court held invalid a discrimination against Chinese, although there can be no doubt that the state may prohibit the hand laundry business, because in *Quong Wing vs. Kirkendall*, 223 U. S. 59, 83, this court upheld an act requiring the payment of a license to do hand laundry work, but none for the operation of a steam laundry. There Mr. Justice Holmes, speaking for the court, said:

"If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

In *State ex rel. Constantini vs. Darwin, as State Fish Commissioner*, 102 Wash. 402, an application for a writ of mandamus was made to compel the defendant to issue a fishing license for the year 1918. The relator was an Austrian, resident in the state since 1913, in which year he declared his intention to become a citizen of the United States. His application for such license has been denied by the fish commissioner, because of section 5150-43 of Remington's Annotated Code, which provides:

"No license for taking or catching salmon or other food or shell fish required by this act shall be issued to any person who is not a citizen of the United States of the age of eighteen years or over, unless such person had declared his intention to become a citizen and is and has been an actual resident of the state for one year immediately preceding the application for such license. * * *."

And also section 4362 of the 1916 Compiled Statutes of the United States, which provides:

"No alien who is a native citizen or subject, or denizen of any country, state or sovereignty with which the United States is at war, at the time of his application, shall be admitted to become a citizen of the United States."

The court held that, despite the fact that the relator could not be admitted to citizenship, he was nevertheless entitled to his license.

From the foregoing it follows that even though the prohibition is with respect to a business which can be prohibited to aliens and citizens alike, a prohibition with respect thereto against aliens alone, or some aliens, is invalid, as in contravention of the equal protection clause.

The power of the council, with respect to the business of a pawnbroker, is to enact such reasonable ordinances, with respect thereto, as will make it impossible for dishonest men to engage in the business and as will prevent dishonest practices by anyone engaged therein. The attempted classification found in the ordinance in question does not even tend to the accomplishment of that purpose. Even the counsel for the defendants in error will not assert that among the proscribed class are not to be found many individuals who have the same respect for the American institutions and the American Government as have citizens of the United States, nor that any alien, whatever his respect for American institutions, whatever his honesty or integrity, may under any circumstances engage in business as a pawnbroker. In other words, under the guise of the police power, the city council has merely attempted, by arbitrary and oppressive means, to serve an ulterior purpose, namely, to make it impossible for any Japanese to engage in business in the city as a pawnbroker.

The action of the city council is condemned by the decision of this court in *American Sugar Refining Company vs. Louisiana*, 179 U. S. 98, where this court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle, is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon difference of color, race, nativity, religious opinion, political affiliation, or other consideration having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

The ordinance in question is likewise invalid, because of the constitutional right of the plaintiff in error to work for a living at any of the common occupations of the community. This right is a part of the freedom which it was the purpose of the Fourteenth Amendment to secure. (*Barbier vs. Connolly*, 113 U. S. 27, 31; *Powell vs. Pennsylvania*, 127 U. S. 678, 699; *Allgeyer vs. Louisiana*, 165 U. S. 578, 579; *Yick Wo vs. Hopkins*, 118 U. S. 356, 370; *Coppage vs. Kansas*, 236 U. S. 1, 14, 19; *Truax vs. Raich*, 239 U. S. 33, 41; *Terrace vs. Thompson*, decided Nov. 12, 1923.)

It cannot be disputed that engaging in business as a pawnbroker is one of the common occupations followed throughout the United States, and it is confidently submitted that if this ordinance is constitutional, the protection afforded aliens lawfully within a state is confined to the right to engage in physical labor.

The treaty between the United States and Empire of Japan does not permit of the refusal of the city to grant the plaintiff in error the license in question.

The provisions of the treaty which require consideration are the following (U. S. Stats. at Large, vol. 37, pp. 1504-1509):

"The President of the United States of America and his Majesty, the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding which happily exist between the two nations, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result, have resolved to conclude a treaty of commerce and navigation for that purpose."

"Article I.

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes and, generally, to do anything incident to or necessary for trade, upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

"They shall not be compelled, under any pretext whatever, to pay any charges or taxation other or higher than those that are or may be paid by native citizens or subjects.

"The citizens or subjects of each of the high contracting parties shall receive in the territories of the other the most constant protection and security for their persons and property and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or

subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects."

In the construction of treaties certain rules were early established and have always been adhered to.

"Where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred. (*Shanks vs. Dupont*, 3 Pet. 242.) Such is the Federal rule in this court." (*Hauenstein vs. Lynham*, 100 U. S. 483.)

"It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the party to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is to be preferred." (*De Geofroy vs. Riggs*, 133 U. S. 258, 271.)

"We think, then, that the rights of the parties must be determined by the treaty, but that this particular convention being operative upon both powers, and intended for their mutual protection, should be interpreted in a spirit of *uberrima fides*, and in a manner to carry out its manifest purpose. (Taylor, International Law, sec. 383.) 'As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done without the sacrifice of individual rights or those principles of personal liberty which lie at the foundation of our jurisprudence. It is said by Chancellor Kent in his Commentaries, vol. 1, p. 174: 'Treaties of every kind * * * are to receive a fair and liberal interpretation according to the intention of the contracting parties, and to be kept with the most scrupulous good faith. Their meaning is to be ascertained by the same rules of construction and course of reasoning which we apply to the interpretation of private contracts.'" (*Tucker vs. Alexandroff*, 183 U. S. 424, 437.)

"Is it necessary in an enlightened age to say that mental reservations cannot be admitted into treaties? This is manifest since by the very nature of the treaty the parties are bound to express themselves in such a manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon mental reservation. What can be the use of such an artifice unless to lull the opposite party into a false security under the vain appearance of a contract?" (Vattel's Law of Nations, p. 284.)

On the same subject the Washington court said in the case of *In re Stixrud's Estate*, 58 Wash. 339, 353, where it is said:

"This construction of the terms of the treaty finds additional support when we call to our aid the general rule of liberal construction applied by the courts, both state and federal, in such cases. In *Geofroy vs. Riggs*, *supra*, at page 271, Justice Field said:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention

of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public laws of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 100 U. S. 483, 487.)”

“See, also, 28 *Am. & Eng. Ency. Law* (2d Ed.), 490; *Devlin, Treaty Power*, secs. 116, 125.”

Japan, in entering into the treaty was entitled to understand that it prohibited an invidious discrimination against Japanese whereby they were singled out and subjected to penalties and disabilities to which citizens were not subjected when the discrimination was one which the diplomatic history of the United States shows the United States would not have permitted any state or nation to have made against a citizen of the United States.

In March, 1882, the American legation at Madrid reported overtures by the Liberian minister, resident at Madrid, looking to a concerted remonstrance of the diplomatic representatives at that capital against a Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on the condition of depositing \$1000. The Department of State had never had a case presented where the rights of an American citizen became involved, but the Department of State advised the legation that if a case should be brought to its notice it would remonstrate against it “as imposing a race discrimination not foreseen by treaty or recognizable under the amended Constitution.” (*International Law Digest*, Moore, vol. 4, sec. 552.)

In 1873 a controversy arose between the United States and Russia. A license had been refused to a Jewish American citizen in Russia. The United States took the position that an American citizen could not be discriminated against because of his religious belief. Mr. Fish, Secretary of State, commenting on Mr. Jewell’s presentation of the case, remarked that the withholding of the license from Rosenstrauss “on account, as it is understood, of his being a Hebrew of foreign birth,” seemed to be in direct violation of the treaty the purpose of which was to place all citizens of the United States in Russia “on the same footing as native Russians.” (*International Law Digest*, Moore, vol. 4, p. 113.)

It certainly was not within the contemplation of the parties to the treaty of 1911 that Japanese should be put on a lower footing than citizens.

In 1885 the United States had a controversy with Turkey in reference to a Hebrew American citizen. *International Law Digest*, Moore, section 555, states:

“In an instruction of August 29, 1885, to the American minister at Constantinople the Department of State observed that the rights of American citizens in Turkey under treaties were to be measured in a certain degree by the rights conceded to other foreigners of the most favored nation and for this reason the minister was to be ‘careful to make no untenable demand as of right.’ Friendship and comity, however, entitle the United States, said Mr. Bayard, ‘to ask and expect that no race or class distinction shall be made as regards American citizens abroad.’”

In 1879 a question arose between the United States and Mexico concerning a law of Mexico of 1863, which provided that natural-born and naturalized citizens of nations adjoining the Republic could not acquire public lands in the states bordering such nations. The United States took the

position that a citizen of the United States was invidiously discriminated against in contravention of the treaty between the United States and Mexico by the law of 1863.

A communication from the United States to Mexico contains the following language:

"The discrimination in this respect between those citizens and other foreigners is still believed to be invidious, unnecessary, at variance with the treaty, and quite incompatible with those friendly relations which the obvious interest of both countries requires should be maintained between them * * *. The Mexican law of 1863 is especially invidious towards citizens of our border states because it practically discriminates against them by name and thereby stigmatizes them as unworthy to have the privilege of holding the real estate. This stigma cannot be acquiesced in by this Government, which does not admit the right of any foreign power to discriminate between citizens of different states of this Union who can only be known abroad as citizens of the United States. It may be that the treaty of 1831 does not expressly confer upon citizens of the parties the right to hold real estate in their respective territories nor does it provide for an equality of rights in that respect between Mexicans and our own citizens. Although the equality between citizens of the United States and other foreigners in Mexico is by the second and third articles of the treaty literally restricted to matters of commerce and navigation, it may also fairly be construed to include a like equality in the privilege of acquiring and holding real estate.

"It cannot be doubted that if the construction now claimed had been anticipated it would have been thwarted by an explicit provision. There is believed to be no such discrimination against Mexican citizens in any law in this country." (International Digest, Moore, vol. 6, p. 702.)

The Mexican Government did not yield to the protest of the United States. On the other hand, the United States did not withdraw its protest. Was the United States acting in good faith in making its protest to Mexico? Certainly no American would for one moment contemplate the thought that the United States was trying to force a weaker power to yield to a view of the law which the United States believed was unfounded. It must be assumed that the United States in good faith believed that the Mexican law constituted an invidious discrimination against citizens of the United States. This controversy with Mexico arose long before the United States and Japan entered into the treaty of 1911. Was Japan justified or not in assuming that an invidious discrimination between Japanese and citizens of the United States was not forbidden by the treaty, when the United States in its controversy with Mexico had taken the position that a very much less objectionable discrimination had been made by the Mexican law against citizens of the United States. Certainly good faith would have required the United States to have notified Japan that it no longer believed that the protest which the United States had made to Mexico was well founded in law. It is certain that had the United States inserted in the treaty with Japan a provision that Japanese might be discriminated against so that they would not, under the law of certain states of the United States, have the same privilege as citizens, the treaty would not have been entered into by Japan, and it is equally certain that if it had been contemplated by Japan that the treaty as written permitted such discrimination the treaty either would not have been made or else there would have been a provision inserted in it thwarting such interpretation.

After the treaty of 1911 had been ratified by the respective countries, the President of the United States proclaimed its ratification in the following language:

"Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said treaty as amended and the said understanding to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

As the opening of the treaty states, it was entered into for the purpose of "strengthening the relations of amity and good understanding which happily existed between the two nations." It is inconceivable that the treaty contemplated the right of a city to enact a law which might cause a breach of international relations between the two countries when the breach would be brought about by a city making a discrimination which was equally invidious as the discrimination which had been the cause of a protest by the United States to Mexico prior to the enactment of the treaty of 1911.

Is it for one moment to be supposed that in the treaty of 1911 the United States expected Japan to understand that it would be permissible for a city of one of the states of the Union to enact a law in the future which would impose upon Japanese subjects resident in such states a disability to engage in one of the common occupations which was not imposed upon citizens? If not, then the upholding of such a right on the part of the city would be to charge the United States with entertaining the thought of such a mental reservation.

The supreme court of Washington held that the business of pawnbroking was not carrying on trade and that the right to trade, granted in article I of the treaty, "means only the pursuits of those callings in which an individual has an inherent right to engage." We find ourselves unable to accept the proposition that the treaty grants only inherent rights. If that were true, then the treaty would serve no purpose whatever. Therefore, it is necessary to determine the meaning of "trade" as used in the treaty, and the meaning of "commercial purposes" likewise appearing in article I of the treaty. It is obvious that "leasing land for residential and commercial purposes", guaranteed in article I of the treaty, carries with it the right to engage in commercial business, as otherwise the nationals of Japan would have the right to lease land for commercial purposes but not to engage in business after having so leased land.

The term "trade" is not generally given the limited meaning first above suggested. In *Schooner Nymph*, 1 Summ. (U. S.) 517, in interpreting the word "trade" as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other trade than that for which she is licensed," she shall be forfeited, Storey, J., said:

"The word 'trade' is often, and indeed generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal art or in the learned professions, it is constantly called a trade."

In that case codfishing was held to be a trade.

In the case of *State vs. North*, 160 N. C. 1010, the court had under consideration the case of a statute authorizing taxation of trades, professions, franchises and incomes, and during the course of an opinion said trade comprehends,

"Not only all who are engaged in buying and selling merchandise, but

all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment, or business embarked in for gain or for profit."

In the case of *Smith vs. Cooley*, 65 Cal. 46, the court held that the working of a mine under a bare mining right has uniformly been construed by the courts as a species of trade.

In *Chase National Bank vs. Faurot*, 149 N. Y. 532, the court held that the bonds of a railroad company, payable to an individual or his assigns, are commercial paper.

In *State vs. Phipps*, 50 Kan. 609, the court, speaking of "trade", said:

"In the broader sense it is any occupation or business carried on for subsistence or profit."

In the case of *State ex rel. Denny vs. Bridges*, 19 Wash. 44, the court said:

"As asserted by counsel for plaintiff, the word 'commercial' is one of wide significance, and in its general sense may mean almost any transaction or intercourse between men."

In *Spotswood vs. Morris*, 12 Ida. 360, the court held that a commercial partnership is one which is engaged in trading in merchandise or in financial operations. It is readily apparent that the terms "trade" and "commerce" as used in article I of the treaty are terms of broad significance and when there is borne in mind the rule that if a treaty is susceptible of two constructions, one restrictive of rights that may be granted under it and the other liberal, the latter is to be preferred, it seems incontrovertible that the broader meaning must be given these terms.

The meaning of these terms were considered by the superior court of the State of California for the County of Los Angeles in the case of *State vs. Tagami et al.*, instituted by the attorney-general of the State of California for the purpose of escheating a leasehold interest in real estate, the lease being for the purpose of conducting a health resort or sanitarium. The case was heard on demurrer to the complaint and Judge Hewitt, on July 9, 1923, delivered an opinion in which he held that the term "commercial purposes" included conducting a health resort or sanitarium. His opinion indicates such an extensive investigation on his part and is so well considered that we quote therefrom as follows:

"This brings us to the question at issue, namely, can a native and citizen of Japan, resident in California, lease, occupy and enjoy lands for the purpose of maintaining a health resort? The answer to this question depends upon the meaning of the words of the treaty wherein it permits a subject of Japan to lease land 'for residential and commercial purposes' in the United States and *vice versa*.

"The word 'commerce' occurs several times in this treaty, as in article 11, where it is provided that 'premises—used for purposes of residence or commerce shall be respected'; again in article IV where it is stipulated that there shall be, between the territories (of the contracting powers), 'reciprocal freedom of commerce and navigation.' In article XIV where the 'most favored nation clause' occurs, we read that 'in all that concerns commerce and navigation' any privilege or immunity granted to the citizens of any other state shall extend to the citizens of each contracting party reciprocally. The derivative 'commercial' is found twice in the treaty, once in article I as hereinbefore quoted, and again in article VII where it is provided and 'commercial, industrial and financial' companies and associations shall have authority to exercise the rights therein specified.

"Plaintiff's counsel contend that 'when the word "commercial" is used in article I of the treaty, giving to the nationals of the two countries the right to "lease lands for residential and commercial purposes"' it shall be

regarded as dealing with 'commerce' in its elementary sense of trade and barter in goods, wares and merchandise, either wholesale or retail.

"In support of this view, our attention is invited to the fact that article I of this treaty as first proposed by the Japanese negotiators underwent an important change in the United States Senate. In the original draft of this treaty article I recited among other things that the citizens and subjects of each state residing in the territories of the other should 'be permitted to own or hire and occupy the houses, manufactories, warehouses, shops and premises which may be necessary for them, and to lease land for residential, commercial, industrial, manufacturing and other lawful purposes.' As revised in the Senate, and as contained in the ratified treaty, the clause was modified, and, as it now reads, it grants liberty to the nationals of the respective powers to 'own or lease and occupy houses, manufactories, warehouses and shops, to lease land for residential and commercial purposes,' etc. That there is here a very material change is manifest, and it was the subject of discussion in diplomatic correspondence in 1913 between Mr. Bryan, then the American Secretary of State, and the Japanese ambassador at Washington, about the time the first California Alien Land Law was pending in the state legislature. The former, in his letter to the latter (dated July 16, 1913), referred to this particular matter and said: 'It thus appears that the reciprocal right to lease land was confined to residential and commercial purposes, and that the phrases "industrial" and "other lawful," which would have included the leasing of *agricultural lands*, were omitted.' As to the exclusion of the leasing of lands for agricultural purposes, the effect of these verbal changes is clear. Does it also follow that the omission of the phrases referred to has also excluded occupations like that here under consideration, which, it is arguable, were just as clearly permitted under the original draft? If so, a long and very interesting list of occupations and enterprises are banned by the treaty, although we are here concerned with but one. It is therefore well to take note of the implications involved, in a proper decision of the questions here presented. The statement was made in argument, and of the fact the court will take note, the Japanese are engaging in many occupations and professions that do not fall within our conception of trade or barter, or the exchange of goods as implied in the elemental or primary meaning of the word 'commerce.' They conduct lodging houses, their priests of religion maintain 'temples for Buddhist worship.' They operate pool rooms and other places of amusement, and practice medicine, surgery and dentistry, and operate employment agencies. Their interpreters certainly interpret in our courts, but if they lease offices where they make engagements for their services with signs posted on their doors, their right so to do is open to question. This list is not exhaustive, but none of the things mentioned pertains to the 'carrying on of trade, wholesale or retail.' Nor do they involve the 'sale of goods, wares or merchandise.' Was it really intended to exclude Japanese from engaging in such occupations or callings as here suggested? Yet it must be conceded, if a close and strictly etymological definition of the words 'commerce' and 'commercial' used in treaty and as ordinarily employed in the English language is to be followed, such a conclusion would logically follow.

"It is important, therefore, to determine, if we can, what is meant by the language of the treaty which permits citizens of Japan (aliens ineligible to citizenship) 'to lease lands for residential and commercial purposes.' At the outset, the word 'commerce' as has so often been said, is a 'term of the largest import.' As used in the Constitution of the United States, the word 'commerce' has been defined on many occasions by the federal courts, beginning with the famous decisions in *Gibbons vs. Ogden* rendered

by Chief Justice Marshall. There it was said that 'commerce' undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, and among the several states and with the Indian tribes,' including the power to regulate navigation. Further, the opinion proceeds: 'The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter.' (9 Wheaton U. S. 188.)

"No useful purpose would be served by quoting from subsequent decisions—when this broad definition has been repeated and applied in particular cases and under the many varying circumstances that have come before the courts. But we can discern from the beginning that 'commerce' as used in the Federal Constitution includes all the instruments and agencies by which it is carried on. As illustrative of the definition of 'commerce' as there used, in line with the first declaration above quoted, and typical of all decisions to which my attention has been directed, we need only refer to one, where it was held that a newspaper is a subject of 'commercial intercourse.' (*Preston vs. Finley*, 78 Fed. 850.)

"Commerce is a term of the largest import. It comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale and exchange of commodities between the citizens of this country and the citizens or subjects of a foreign country, and between citizens of the different states. It is said that commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation of persons and property, as well as the purchase, sale and exchange of commodities. Commerce is undoubtedly traffic, but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribed rules.'

"But of more recent years, as life and society have become vastly more complex on one side and specialized on the other than in former times, we note a tendency to enlarge the definition of 'commerce' in judicial decisions. For example:

"Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the object of commercial regulation.' (*Riverside Mills vs. Atlantic Coast Line R. Co.*, 168 Fed. 987; see also *Northern Securities Co. vs. United States*, 193 U. S. 197.)

"So much for 'commerce' in the constitutional sense, as we ourselves use the term when dealing with the subject of federal and state regulations of commerce. 'Commercial,' the derivative of commerce, means primarily anything of or pertaining to commerce. The phrase 'commercial corporations' occurs here and there in our laws, and a case which may be referred to as having a certain value for purposes of definition, is found in 193 Fed. Reports. There it was held that a corporation engaged in leasing its own property and collecting rents therefrom is a moneyed business or commercial corporation, within the meaning of the Federal Bankruptcy Laws. (*In re Radke Co.*, 193 Fed. 735.)

"I quite agree with counsel for plaintiff when they argue that the question here to be determined is the sense in which the framers of the

treaty used the words 'residential and commercial purposes' and what they had in mind, as evidenced by a fair and reasonable construction of the term they employed to express their intentions.

"Granting that this treaty is essentially a treaty of commerce and navigation, it does not necessarily follow that it is exclusively such. Nor is it also a necessary conclusion that its words, where they mention commerce and commercial purposes, are to be taken exclusively in the 'elemental' or primary sense as signifying traffic in goods, wares or merchandise, and that only. The rules applied generally to the interpretation of treaties, as announced by our federal courts, where such questions more commonly arise, and likewise by writers on international law, alike unite to caution us against a too rigid construction of the terms of a treaty, unless the narrow rather than the liberal meaning is clearly indicated.

"By the terms of the first paragraph of article I, Japanese subjects in the United States may do the following things: (1) They may carry on trade, wholesale and retail; (2) they may own or lease and occupy houses, manufactories, warehouses and shops; (3) they may employ agents of their choice; (4) they may lease land for residential and commercial purposes; (5) and they may generally do anything incident to or necessary for trade. Of course all these matters are reciprocal, and Americans residing in Japan may do the same things there. As plaintiff would construe those provisions, they would mean that Japanese may here only carry on wholesale and retail trade or traffic in goods, wares and merchandise, and for that purpose they may lease and occupy houses in which to live, and factories, shops and warehouses, together with only such lands as may be necessary or convenient for living, and the making, storage and sale of the articles in which they deal. That such a conclusion is literally possible may be admitted, but if it does violence to the real purposes of the treaty, otherwise reasonably obvious, and works an unnecessary restriction on the Japanese residing here, as well as Americans residing in Japan, apparently not specifically contemplated by the authors of the treaty, the disposition of the courts would be to examine a little closer into the purposes of the treaty in the light of the attending circumstances, so far as they may be reasonably shown or inferred. All the more would this be the case where the literal or close construction deprives the nationals of one country residing in the other of some privilege from which if denied, the citizens thereof can reap no tangible advantage at best, and which construction too requires us to say that both countries have intentionally and mutually imposed a restriction on the privileges of their own citizens residing in the other which they cannot reasonably be said to have contemplated in the nature of the case.

"But from my examination of this treaty, I am not prepared to say that the strictly literal interpretation above referred to is the only one that should be permitted. It seems to me these several things which Japanese residing here, and Americans residing in Japan, may do are distributively stated in the treaty as separate things, so far as their relation to each other is concerned, and are not to be regarded as merely and only different parts or phrases of one and the same thing, namely, the buying and selling of goods, wares and merchandise; when article I of the treaty gives Japanese the right to own or lease and occupy houses, factories, warehouses and shops, and to lease land for residential and commercial purposes, it would seem to me that the phrase 'commercial purposes' is a somewhat broader and more general phrase than 'to carry on trade' in the sense of dealing in merchandise only.

"I am not unmindful of the fact that our courts and text writers have enunciated certain rules for the construction of treaties.

"In *Geofry vs. Riggs*, 133 U. S. 258 (271), Mr. Justice Field made a declaration to the effect that, in the construction of treaties, 'Words are to be used in their ordinary meaning, as understood by the public law of nations, and not in any artificial or special sense imposed upon them by local law, unless such restricted sense is clearly intended.'

"Professor Hyde in his recent work in International Law (sec. 531) says:

"The ascertaining of the sense in which terms have been employed in a treaty involves a search for sources of information. Those may be found in what is intrinsic to the agreement. The use of whatever sheds light on the question involved is not restricted by prohibitive rules such as those in which the common law abounds. As Professor Westlake has well said, 'The important point is to get at the real intention of parties, and that inquiry is not to be shackled by any rule of interpretation which may exist in any particular national jurisprudence, that is not generally accepted by the civilized world.'"

"Another authority, Wigmore on Evidences, thus expresses the principle of treaty interpretation:

"Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words—that is, their association with things.' (Wigmore on Evidence IV, p. 3470.)

"In summing up his discussion of the so-called 'rules of construction of treaties,' Professor Hyde gives expression to the following statements (sec. 533):

"That the courts of a contracting state, such as those of the United States, not on the assumption that it was the design of the contracting parties not to contravene principles of morality and fairness, and not to provide the means for perpetrating or protecting frauds, that their agreement should be interpreted in a spirit of the utmost good faith, and in a manner to carry out its manifest purpose, and that its terms should be liberally construed, manifests simply an imputation of good faith and high purpose to the executive branch of the Government and to that of other contracting powers. It is recognition of the only intelligible theory in which enlightened states could be deemed to conclude treaties with each other.

"The court may wisely hesitate to indulge in the presumption that the terms of a treaty were given a significance such as to entail a peculiar sacrifice by one party, and involving undertakings beyond the requirements of international law. Such a reluctance indicates, however, nothing more than a demand for convincing proof that those terms were used in such a sense. It does not imply any denial of the right of the parties to so agree; nor does it concern the nature of the evidence which may be competent to establish the fact. Such a judicial attitude may be regarded as more salutary than one evincing readiness to presume that the contracting parties did not attach to the terms of the treaty a significance which they might not unreasonably have adopted.'

"Once more from Justice Field:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them.' (*Geofry vs. Riggs*, *supra*.)

"A brief, but comprehensive summary of the attitude of the United States Supreme Court toward the construction of the treaties is thus expressed:

"It is a general principle of construction, with respect to treaties, that they shall be liberally construed, so as to carry out the apparent intention of the parties, to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that when a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.' (*Hauenstein vs. Lynham*, 100 U. S. 483.)

"Counsel for the state, in their oral argument and brief, have made an analysis of this treaty and therefrom they conclude that such resume 'clearly shows that, judging from its context, the framers thereof had in mind actual trade, such as is conducted in shops, factories, etc. The purpose was to facilitate trade and shipping between the two countries and to permit the occupation of lands by the 'nationals of each of the two countries in the territories of the other only to the extent that it was necessary to carry on such trade.'

"That the treaty does indeed subserve the purpose here stated will be conceded, but while it does that, it does something more. Herein lies a distinction not unlike that which we have above observed between the definitions of commerce as comprising in goods and business intercourse as well.

"But there is another deduction to be drawn from a reading of this treaty, which to my mind indicates that it is not confined to actual trade only, and rights incidental thereto exclusively. An examination of the treaty provisions will show that it deals with rights of two quite distinct and severable classes, namely: First, the personal rights of the citizens of each country residing in other, which may be generally described as rights of aliens as individuals, and secondly, the regulations of trade, commerce and navigation and the rights pertaining thereto. In support of this view, it may suffice to state that under the terms of the treaty the citizens of either country may enter, live and travel in the other, own houses and lease lands for residential purposes; they shall enjoy complete equality of taxes with native citizens; they are entitled to the most constant protection and security of their persons and property; they are exempt from military and naval service; their dwellings, factories and shops, and the premises pertaining thereto, shall be respected; they are entitled to the protection of the safeguards of the local laws in the matter of domiciliary visitation and search under legal process; they have the same protection with regard to patents, trademarks and designs as our own subjects enjoy. On the other hand, the treaty deals with another class of regulations of a purely commercial or mercantile character; wherein it treats of consular officers and their credentials, the freedom of commerce and navigation, the regulation of import and export duties, the exemption from transit duties, the right of limited liability companies, the privilege of vessels in the postal service, the discharge of cargoes of vessels at ports, and the like.

"I cannot, therefore, bring myself to the conclusion that the treaty is purely a commercial treaty in the narrow or strict sense. It is indeed that, but it is much more, as the above general reference to some of the subjects with which it deals ought to make manifest. The regulations of the

status of the Japanese as residents in this country and of Americans as residents in Japan is as clearly one of the purposes of this treaty as its office in prescribing the rules that shall govern commercial intercourse between the two nations whose representatives signed it. Let it not be overlooked that the two aspects of the treaty are mutually exclusive at all points, for in serving its two-fold purpose it is not divided into articles that are separated from each other, like water-tight compartments. With respect to the particular point here under consideration, namely, what things the Japanese may do and what they may not do in this country, partakes of the nature of both aspects of the treaty. The very act of limiting their business or economic activity is to that extent a limitation upon their status of rights as persons residing in the community.

"For the most part, the public and judicial discussions heretofore of the Japanese treaty and the California Alien Land Laws have been concerned with the leasing of agricultural land in the raising of products of the soil. But no such question is even remotely involved in this case.

"As we have seen, if the phrase 'commercial purposes' appearing in the treaty must be construed in the same manner as 'commerce' is defined in our Federal Constitution and laws, and if the treaty itself, as an entirety, is to be regarded as a treaty of commerce and navigation only and construed in that light alone, there is plausible ground to hold that 'commercial purposes' means only purposes relating to trade in goods, and the agencies and instruments by which it is carried on. And the same is doubtless true, if we are under the necessity of construing 'commerce' as it is defined in the dictionaries of our language, but there were two parties to the treaty of diverse race and speech and it represents the contract both parties made to cover a present situation and to provide for future conditions affecting persons belonging to these dissimilar races. Looking at the problem from the common standpoint of both the United States and Japan, each was concerned about the safety and with the rights and well-being of its own citizens residing in the territories of the other, within certain limitations of course, but in terms of perfect equality, quite as much as with establishing rules under which commerce and navigation between the two countries should be carried on. Likewise, each country, in so doing, was necessarily considering what rights and privileges it was willing to extend to the 'nationals' of the other residing in its own territories.

"The balance between these two considerations, is the resultant as expressed in the treaty. There were and are Americans in Japan, just as there were and are Japanese residing in the United States. We are not concerned with any question of immigration here, nor with the relative numbers of the citizens of either country residing in the other; but only in determining, if we may, what the treaty negotiators of both countries meant when they stipulated that the citizens of either residing in the other might lease lands for residential, and particularly, commercial purposes.

"I am not aware of any definition of commerce or commercial purposes laid down in our law books, or contained in the dictionaries of the English language, that includes the rendering of personal or professional services for a consideration as being within their meaning. Certainly these terms, as ordinarily applied by us, do not include such services.

"Tested by the hard and fast definition of commerce commonly accepted among our own people, the lawyer, dentist, surgeon, physician, priest, or pastor, teacher, interpreter, engineer, or indeed any professional man, in following his calling, is not engaged in commerce; and his office or dwelling is not owned or leased for a 'commercial purpose.' Neither is such a person

carrying on 'trade, wholesale or retail', nor is his office a 'factory, warehouse or shop.'

"By the same token, the barber, the cobbler who repairs but does not sell shoes, the bootblack who shines, but does not sell brushes or polishes, the proprietor of a place of amusement or recreation, who provides a diversion, be it pool or billiards, a movie show, newspapers or books to read, but sells neither billiard balls, cinema films nor books nor papers, is not engaged in commerce. Likewise the Buddhist priest who performs the ministrations of that faith, either by religious service or teaching, or by the instruction of Japanese youth for a fee or contribution, is not engaged in commerce, and the premises where he so ministers, if leased or owned, is not so owned or leased for a commercial purpose. Yet again the lodging housekeeper, who lets rooms to guests for hire and thus provides a place for them to rest and sleep, sells no 'goods, wares or merchandise'—he himself carries on no wholesale nor retail *trade* in the ordinary sense of the term as we use it.

"A ready answer to all this might be that persons employed in all these various occupations, and others that might be named, are really engaged in commerce because they sell their services, which, if it be a true answer, likewise answers the question here to be decided without further argument. But such an answer begs the question entirely and is equally at variance with the dictionary definition of commerce. There is indeed a certain school of political economists which holds to the theory that labor is a 'commodity' which may be bought and sold like any other, and that brain and brawn are the 'goods, wares and merchandise' so to speak which one hires or sells just as another sells collars or needles. I am not prepared to accept that dogma on general principles, for it is of the hardness of the coarsest materialism. But what of the teacher, priest, doctor, dentist, lawyer, interpreter and the rest of the professional catalogue? Are their services also a commodity of the class of goods, wares and merchandise to be sold and purchased the same as any other article of trade or commerce?

"These questions have occurred to me as I have considered this case, not for the purpose of indulging in refinements of casuistry, but to enable me to read, if I may, *in this treaty*, the fair, reasonable and just meaning of its terms. Do they really mean that no Japanese can teach or contract to teach the language, or act or contract to act as an interpreter for a fee? Do they mean that no Japanese may operate a place of amusement or recreation where he sells nothing that the patron can carry away in his pocket or in a basket? Do they mean that no Japanese can conduct a lodging house for hire? Do they mean that no Buddhist priest can perform a Japanese burial service for a contribution? Do they mean that no American professional man can do any of those things in Japan, and that no American clergyman can bury our dead there for any sort of compensation notwithstanding the payment of a contribution for that sacred service is not unknown among us here at home, yet, we do not call that 'commerce.'

"I would rather say that in providing for the security, livelihood and well-being of our own 'nationals' in Japan, as well as the 'nationals' of Japan here residing, the framers of this treaty did not intend, nor should we here say they intended, to deprive them of the right when sick and in ill health to be advised and prescribed for by physicians of their own race, to be attended by nurses of their own race, to be cared for in a place maintained by persons of their own race, and with other congenial surroundings, if they so desire. One wholesome way to look at a question of this sort is

to turn it around and look at the other side. Suppose an American physician in Japan, finding the needs of such an institution in Tokyo or Kobe, should conceive the idea of establishing a sanitarium for the treatment of Americans in ill health sojourning in Japan. Suppose, further, the Japanese Government, through its duly constituted officers of the law, should put him out of business, declare his lease and 'all the appurtenances thereto belonging' forfeit to the Empire because this same treaty was being violated—his place not being leased or occupied for a 'commercial purpose.' It would probably seem to us that the Japanese Government was stricking in the bark, and that it was doing violence to the spirit of the treaty contract, while apparently zealously observing its technically correct letter. I am rather inclined to the belief that in drawing up this treaty its authors had no intention of excluding the citizens of either country who reside in the other from following any of the occupations herein mentioned, even though none of them, strictly considered, fall within any definition of engaging in 'commerce' tested by the rigid standard of trade in goods, wares and merchandise.

"It must be apparent that, in so far as the decision to be made in this case now, or hereafter by other tribunals of higher jurisdiction, turns upon the question of leasing or use of premises for 'commercial purposes' (ignoring 'residential purposes' for the moment), such decision will itself turn upon the point whether a strictly literal or liberal construction of this treaty is to be adopted. As I understand it, one of the accepted methods sometimes resorted to in the interpretation of a treaty is to compare it with previous treaties between the same countries, dealing with the same general subject matter. There was from 1894 to 1911 a Treaty of 'Commerce and Navigation' in force between the United States and Japan, which was superseded by the treaty here involved. Among other things the former treaty provided that the citizens of each country residing in the other 'shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects.' Again, the treaty of 1894 provided that 'the citizens or subjects of each of the contracting parties shall enjoy in the territories of the other entire liberty of conscience, and subject to the laws, ordinances, and regulations, shall enjoy the right of private and public exercise of their worship, and also the right of burying their respective countrymen according to their religious customs, in such suitable and convenient places as may be established and maintained for that purpose.'

"Now, the fact is the treaty of 1911 contains no such provisions as the two above quoted from the treaty of 1894 at all. The present treaty is entirely silent on the subject of resort to the courts for redress of wrongs or the protection of rights, and it says nothing about the exercise of worship, either public or private. Are we to deduce from this circumstance that the framers of the present treaty really intended to deprive the nationals of each country residing in the other of such fundamental rights as these? Were the matter of sufficient importance, it might be interesting to know the reasons for these omissions from the treaty of 1911. Probably the explanation is that, such rights being so 'elemental,' it was considered

that no country claiming to be civilized would deny them, and therefore that their retention in the compacts between these two nations was superfluous. But, however that may be, the fact remains that these rights of resort to the courts and freedom of worship were omitted, intentionally we must assume, from the treaty now in force. What rule of interpretation are we to apply to this situation—a strictly literal rule or a liberal one? Are we really to say, since this treaty deals with ‘commerce and navigation’ only, and these words being used in the ‘elemental sense,’ that therefore Japanese in America, and Americans in Japan, are not protected in the enjoyment of these rights by the treaty, because, forsooth, the treaty says nothing about them, and they have been dropped from a new treaty which superseded a former treaty which contained them. To answer such a question in the affirmative is simply unthinkable, for reasons which, in part at least, although obvious, would take us outside of a dry question of treaty interpretation. The point I would make, however, is that in the particular just referred to every consideration of public policy and common sense requires that a liberal attitude towards this treaty, as well as of others where our courts have construed them, should be taken. If this attitude is appropriate towards the treaty as a whole, I see no good reason why it should not be taken with regard to its proper interpretation. And I would take it that this position is justified, as to the matters just referred to, notwithstanding that the right to the exercise of religious worship has naught to do with trade in goods, wares and merchandise, and resort to the courts may, but oftentimes does not. Surely a Japanese who is injured in an automobile accident by a fellow countryman, or perchance by a native citizen, if he sues in our courts for his personal injuries, is not resorting to them for a ‘commercial purpose.’

“While reference has been made above to the keeper of a lodging or rooming house, it was there made only for the purpose of calling attention to the fact that a person so employed is not engaged in ‘commerce’ or ‘trade’ in the ordinary acceptance of the terms as we use them, and further, to the logical conclusion, if the treaty is to be given a construction so close as contended for by the plaintiff, the Japanese lodging housekeeper can neither own nor lease his establishment here, nor can an American conduct a hotel, on the so-called ‘European’ plan in Yokohama. But those aliens ineligible to citizenship can, so the treaty provides, lease land for *residential* as well as commercial purposes. Looking at the little lodging house or hotel keeper’s occupation a little closer, however, the view is entirely permissible that people engaged in ‘trade’ and ‘commerce’ need places in which to rest and sleep, and, like other ‘strangers in a strange land’ aliens are most apt, for a variety of obvious reasons, to seek such accommodations in places conducted by persons of their own nationality. No one should be heard to say that it is unlawful for the individual alien to rent and occupy an entire house for a residence, but that he cannot rent a room in a lodging house for a week, a month, or a year for ‘residential purposes’ because, indeed, the person who conducts the lodging house is himself not engaged in ‘commerce.’ Such a proposition is unreasonable on its face. Rather should it be said that lodging houses, rooming houses, hotels (we exclude hotels where meals are ‘sold’), are really instrumentalities by which commerce is facilitated, even though indirectly, for the very good and sufficient reason that commerce cannot be conveniently carried on without them. But aside from that, the lodging housekeeper occupies his house himself, and lets rooms to others for residential purposes, and to hold otherwise is futile.

“Let us carry this rooming or lodging house inquiry a little further.

Aliens 'engaged in trade' do not always enjoy good health; like other people, they get sick, or need rest and recreation, and if not actually sick, persons so engaged oftentimes, like native citizens, are afflicted with impaired health. Hence, we have sanitariums—health resorts. Wherein does the occupation of the Japanese lodging-house keeper differ in an essential particular from that of the proprietor of the sanitarium? The latter provides and equips a place, let us say, favorable in location and with agreeable surroundings for accommodation of guests who are in ill health, furnishes them with rooms, supplies them with a pleasant environment for their betterment, with competent physicians to advise and prescribe for them, or with nurses to attend them, with improved grounds or other conveniences where they may enjoy recreation, rest, or amusement—all this and possibly more. The proprietor of such a place is not engaged in commerce, as we have seen it defined, but he certainly does provide a place of residence, temporary though it be, for a certain class of persons who are in poor health and in need of just such a resort. I cannot believe otherwise but that, both as to the proprietor of such an establishment and as to his guests or patients, the leasing for the purpose of a health resort is essentially the leasing thereof for residential purposes even though other service is provided. If we concede, for the sake of argument, that Japanese residing here can only be engaged in trade, or the actual buying and selling of goods, wares and merchandise, or in occupations incidental thereto, certainly the citizen of Japan who provides a 'residential' place for and therein takes care of his fellow 'nationals' who may be afflicted, physically or mentally, serves a very useful if not 'commercial' purpose in restoring them in mind and body so that they may pursue their several callings here allowed under the treaty. So long as Japanese are permitted to come to our shores at all, which is a matter entirely outside of the question here presented, we should not and cannot deny them the privileges of health restoration at the hands of their fellow countrymen, no more than we can refuse them access to our courts or freedom of religious worship. On the ground, therefore, that the maintenance of a sanitarium is, in the last analysis, both a residential and commercial purpose, I find myself unable to agree with counsel for plaintiffs in the deduction they draw from their literal interpretation of this treaty."

The reasoning of Judge Hewitt is logical and, we submit, unanswerable.

Respectfully submitted,

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3. BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

On July 2, 1921, there became effective Ordinance No. 42,323 of the City of Seattle, providing for the licensing and regulation of the occupation of pawnbroking. (Rec., p. 26.) This ordinance was enacted pursuant to the police power of the state as vested in the city. The particular portion of the ordinance which is attacked in this suit is found in section 6, and reads as follows:

"Provided, however, that no such license shall be granted unless the applicant be a citizen of the United States and a resident of the City of Seattle, or if a corporation, unless the holders of the majority of its capital stock are such citizens. * * *" (Rec., p. 28.)

On July 12, 1921, the plaintiff in error* instituted this action in the superior court of the State of Washington for King County, alleging that he was a subject of the Emperor of Japan, lawfully residing in the City of Seattle, and that he had been engaged in business as a pawnbroker in the city for six years. (Rec., pp. 1-6.) He asserted that the provision of the ordinance hereinabove quoted, requiring that all persons who are applicants for a pawnbroker's license shall be citizens of the United States, was in violation of the Fourteenth Amendment to the Federal Constitution and also in violation of the provisions of a certain treaty existing between the United States and Japan proclaimed April 5, 1911.

The plaintiff in error was awarded a temporary injunction by the trial court (Rec., pp. 9-10), which, after a hearing on the merits, was made permanent. (Rec., pp. 34-35.) The defendants in error thereupon appealed to the supreme court of the State of Washington, which on October 24, 1922, reversed the decree of the trial court and directed that the action be dismissed. (Rec., p. 36.)

The decision is reported under the name of *Asakura vs. Seattle*, 122 Wash. 81, 210 Pac. 30.

The plaintiff in error thereupon was allowed a writ of error by the chief justice of that court (Rec., p. 43), and the case comes here for review as to the validity of the citizenship requirement of the ordinance under the Fourteenth Amendment and the Japanese treaty. (Rec., pp. 41-42.)

ARGUMENT.

Broadly stated, the question for decision is whether a state, or municipal subdivision thereof, under the police power, may limit to citizens of the United States the privilege of engaging in pawnbroking.

It is the position of the defendants in error that engaging in pawnbroking has uniformly been held to be a privilege and that pawnbroking may be prohibited entirely, or permitted upon such terms as the state may see fit to impose, and that, therefore, the limitation of that occupation to citizens is not forbidden by the Fourteenth Amendment nor in contravention of the Japanese treaty.

The argument will be presented under seven subdivisions.

I.

SCOPE OF CITY'S POLICE POWER.

The Ordinance Involved Must Be Treated as a Statute of the State of Washington.

Article 11, section 11, of the constitution of the State of Washington provides:

"Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws."

This provision, as construed by the highest court of the state in numerous cases, vests in municipalities the whole police power of the sovereign State of Washington, subject only to the proviso that no ordinance shall conflict with a statute. The following are a few of the decisions so holding: *Smith vs. Spokane*, 55 Wash. 219, 104 Pac. 249; *Shepard vs. Seattle*, 59 Wash. 363, 109 Pac. 1067; *Seattle vs. Goldsmith*, 73 Wash. 54, 131 Pac. 456; *Malette vs. Spokane*, 77 Wash. 205, 137 Pac. 496; *Detamore vs. Hindley*, 83 Wash. 322, 145 Pac. 462; *Allen vs. Bellingham*, 95 Wash. 12, 163 Pac. 18; *Seattle vs. Hewetson*, 95 Wash. 612, 164 Pac. 234; *State vs. Lovelace*, 118 Wash. 50, 203 Pac. 28; *In re Sound Transit Co.*, 119 Wash. 684, 206 Pac. 921; *Linsler vs. Booth Undertaking Co.*, 120 Wash. 177, 206 Pac. 976; *Storey vs. Seattle*,

124 Wash. 598, 215 Pac. 514. See, also, *Woods vs. Seattle*, 270 Fed. 315, 317.

In *Shepard vs. Seattle*,* *supra*, this rule is stated as follows:

"* * * And we might say in this connection that no question is here involved as to the power of the City of Seattle, as contradistinguished from the power of the state itself, for in all matters appertaining to the public health and public safety substantially *the entire police power of the state is vested in municipal corporations of the first class.*"

Again, in *Seattle vs. Goldsmith*, *supra*, it was said:

"* * * *If it be conceded that the state has the power to pass a law of this character, we cannot see how the conclusion can be escaped that cities of the first class have that power.* Under our constitution, article 11, section 10, such cities are permitted to frame their own charters consistent with and subject to the constitution and laws of the state. Section 11 of the same article of the constitution provides:

"Any county, city, town or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

"These sections delegate the police power of the state to cities of the first class, restricting the exercise of the power to conformity with the constitution and general laws of the state. *If it be admitted then that the passage of this ordinance is within the police power of the state, it must also be admitted that it is within the police power of the city, unless it can be said to be in conflict with some general law, and no conflict is suggested.*"

In *Malette vs. Spokane*, *supra*, is found a similar expression:

"* * * It is the clear intention of the constitution to give to cities of the first class, of which the City of Spokane is one, the largest measure of local self-government compatible with the general authority of the state. (Constitution, art. 11, sec. 10.) It can 'make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.' (Constitution, art 11, sec. 11.) * * * *As to matters of local concern, wider powers than those conferred upon cities of the first class by the constitution and laws of this state can hardly be conceived.* It seems plain, therefore, that unless the ordinance in question is contrary to some public policy of the state, either expressed by statute or implied therefrom, it must be held valid."

This constitutional provision was again construed in *Detamore vs. Hindley*, *supra*, in the following language:

"* * * The one vital question, therefore, is: Has the requisite power been granted to the municipality? The answer must be found in the fundamental and statutory law of this state.

"The state constitution, section 11 of article 11, provides:

"Any county, city, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

"*This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself.* It requires no legislative sanction for its exercise so long as the subject matter is local, and the regulation reasonable and consistent with the general laws."

That the state court still adheres to this doctrine is shown by its recent decision in *Linsler vs. Booth Undertaking Co.*, *supra*, where it is said:

"* * * The ordinance referred to was manifestly passed in the exercise of the police power given to the city by the constitution and the statutes

*All italics in this brief are ours.

in aid thereof. Section 11 of article 11 of the constitution of this state provides that any city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. *This is a direct delegation of the police power as amply within its limits as that possessed by the legislature.* So long as the subject matter is local and the regulations reasonable and consistent with general laws it is not necessary that it be supported by legislative sanction."

This court in *Crowley vs. Christensen*, 137 U. S. 86, 34 L. Ed. 620, referred to the same provision of the constitution of California (which is word for word identical with that of the Washington constitution), and impliedly recognized this construction of it. In that case it was further pointed out that the decision of the state court was conclusive upon that phase of the case, this court saying:

"The constitution of California vests in the municipality of the City and County of San Francisco the right to make 'all such local, police, sanitary and other regulations as are not in conflict with general laws.' The supreme court of the state has decided that the ordinance in question, under which the petitioner was arrested and is held in custody, was thus authorized and is valid. That decision is binding upon us unless some inhibition of the constitution or of a law of the United States is violated by it. We do not perceive that there is any such violation."

That the legislative body was exercising the police power of the state in passing the ordinance in question, is further shown by the language of section 1:

"This entire ordinance shall be deemed an exercise of the police power of the State of Washington, and of the City of Seattle, for the protection of the public economic and social welfare, health, peace and morals, and all its provisions shall be liberally construed for the accomplishment of that purpose." (Rec., p. 26.)

Therefore, in passing upon the constitutionality of this ordinance, the court must test it by the same rules as are applicable to a statute enacted by the legislature under the police power of the state.

II.

PRESUMPTIONS OF VALIDITY.

Every Legislative Act Is Presumed to Be Constitutional, and If Any State of Facts Can Be Reasonably Conceived to Exist Which Would Sustain the Act, the Court Will Presume Such Facts to Have Existed.

No citation of authority is necessary to support the elementary rule of constitutional law that every act of a legislative body is presumed to be within its constitutional powers, unless the invalidity of the act is so apparent as to leave no room for reasonable doubt. In other words, this ordinance must be accorded a *prima facie* presumption of validity.

Furthermore, if any state of facts can reasonably be conceived to have existed which would justify the act, the court must presume that such state of facts did actually exist and that the ordinance was passed for that reason. This rule is well stated in *State vs. Pitney*, 79 Wash. 608, 140 Pac. 918 (which was later affirmed by this court in *Pitney vs. Washington*, 240 U. S. 387, 60 L. Ed. 703), in the following language:

"In determining whether the provisions of a law brings it within the police power, it is not necessary for the court to find that facts exist which would justify such legislation. If a state of facts can reasonably be presumed to exist which would justify the legislation, the court must presume that it did exist and that the law was passed for that reason."

This language was recently approved by the state supreme court in *Cornelius vs. Seattle*, 123 Wash. 550, 213 Pac. 17.

This court, in one of its early decisions upon the police power of the states, adopted this salutary rule. In *Munn vs. Illinois*, 94 U. S. 113, 24 L. Ed. 77, it was said:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. *But if it could, we must presume it did.* Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

Again, in *Sweet vs. Rechel*, 159 U. S. 380, 40 L. Ed. 188, this court said:

"But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, *the existence of the circumstances necessary to support it must be presumed.*"

The same view was expressed in *Laurel Hill Cemetery vs. San Francisco*, 216 U. S. 358, 54 L. Ed. 515, as follows:

"But whatever the tribunal, in questions of this kind great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. (*Dobbins vs. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18; *Lochner vs. New York*, 198 U. S. 45, 58 *et seq.*, 49 L. Ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133.) But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned. (*Welch vs. Swasey*, 214 U. S. 91, 106, 53 L. Ed. 923, 930, 29 Sup. Ct. Rep. 567.) The reluctance must be redoubled when, as here, the opinion of that court confirms a specific determination concerning the same spot, previously reached by the body that made the law. (See *French vs. Barber Asphalt Paving Co.*, 181 U. S. 324, 341, 45 L. Ed. 879, 888, 21 Sup. Ct. Rep. 625; *Smith vs. Worcester*, 182 Mass. 232, 234, 235, 59 L. R. A. 728, 65 N. E. 40.)

"But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, *on the hypothesis that the danger is real, the ordinances would be valid, we should not overthrow it merely because of our adherence to the other belief.*"

In *Mutual Loan Co. vs. Martell*, 222 U. S. 225, 56 L. Ed. 175, this court upheld as a proper exercise of the police power, a statute making invalid against the employer assignments of wages to be earned in the future unless recorded and accepted in writing by the employer, saying:

"We can not say, therefore, that the statute as a police regulation is arbitrary and unreasonable, and not designed to accomplish a legitimate pub-

lic purpose. We certainly can not oppose to the legislation our notions of its necessity, and we have expressed 'the propriety of deferring to the tribunals on the spot.'"

More recently, in *Rast vs. Van Deman*, 240 U. S. 342, 60 L. Ed. 679, this court made a similar holding in regard to a question that was much disputed. It was there said:

"It is established that a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed (citing authorities). It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety (citing authorities)."

See, also, *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. Ed. 369.

In *Booth vs. Illinois*, 184 U. S. 425, 46 L. Ed. 623, this court held that it would interfere in such cases only when it was clear that the act involved had no real or substantial relation to the object sought to be attained.

It follows that if the court can reasonably conceive of any circumstances which would justify the actions of the city council in limiting pawnbroking in the City of Seattle to citizens of the United States, then the court must indulge in the presumption that those circumstances did exist and that this ordinance was enacted on that account. In this case there can be no question that the ordinance has a substantial tendency to correct the evils existing in the pawnbroking business by limiting those engaged in it to persons attached to the principles of our constitution.

III.

MOTIVES OF LEGISLATORS.

The Motives of the Legislators in Enacting a Law Will Not Be Inquired Into By the Court.

Plaintiff in error offered to prove in the trial court that one city councilman advocated the ordinance in question and worked to obtain its passage for the purpose of preventing Japanese from engaging in pawnbroking in Seattle. (Rec., p. 19.) The trial court properly sustained an objection to the proffered testimony.

It is argued by the plaintiff in error that this ordinance was enacted as a result of race prejudice on the part of its principal advocate in the city council. Even if this were true, the fact would be immaterial. This court early adopted the rule in a similar case that the court can not inquire into the motives of the legislators in voting for an ordinance.

In *Soon Hing vs. Crowley*, 113 U. S. 705, 28 L. Ed. 1145, in passing upon the validity of an ordinance of San Francisco regulating public libraries, this court said:

"The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it. The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the City and County of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect

tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impractical and futile. *And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense.*"

Recently this court had occasion to apply this rule in reference to an act of Congress. In *Hamilton vs. Kentucky Distilleries & W. Co.*, 251 U. S. 146, 64 L. Ed. 194, the rule was stated as follows:

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress."

See, also, *McQuillan, Municipal Ordinances*, sec. 161, 19 R. C. L. 904.

It may be noted that no proof was offered as to the motives of the other members of the city council (which consists of nine members), in voting upon the passage of this ordinance.

There is, therefore, nothing in the record to show that this ordinance was the result of racial prejudice, and the offer of proof made in that connection was insufficient to prove a fact which was immaterial in any event.

IV.

CHARACTER OF THE OCCUPATION OF PAWNBROKING.

No Person has a Vested Right to Engage in Pawnbroking.

Having in mind the general principles applicable to this case, which have already been mentioned, we come now to a consideration of the status of pawnbroking under the police power. This occupation has, from earliest times, been held to be one in which no person has a vested right to engage.

Because of the facilities that it affords for aiding in and concealing the commission of crime, it has always been regarded by the law as an inherently vicious occupation which may be prohibited entirely. It is not a necessary business and engaging in it is merely a privilege.

Upon this subject the supreme court of Missouri, in *St. Joseph vs. Levin*, 31 S. W. 101, said:

"The city may not only regulate but suppress pawnbrokers or refuse to license such occupation altogether. No person has the right to follow such occupation within the limits of said city without first obtaining a license from its authorities for that purpose *which may be granted or withheld at pleasure. The business is a privilege, not a right*, and he who avails himself of it and derives its benefits must bear its burdens and conform to the laws in force regulating the occupation if not illegal."

A leading case upon the subject is that of *Grand Rapids vs. Brandy* (Mich.), 64 N. W. 29, where the court had under consideration an ordinance making it unlawful to engage in pawnbroking without having procured a license, the court saying:

"It is next insisted that the ordinance is so unreasonable that it should be declared void. The charter expressly confers upon the common council the power to license and regulate pawnbrokers, junk dealers, and dealers in second-hand goods. Courts can not interfere with legislative discretion, and are slow to declare ordinances invalid because unreasonable, when the power to legislate upon the subject has been conferred upon the common council. The council's discretion, and not the court's, must control. In such matters the city authorities are usually better judges than the courts. (*Fisher vs. Harrisburg*, 2 Grant, Cas. 291; *Com. vs. Robertson*, 5 Cush. 438; *St. Louis vs. Weber*, 44 Mo. 547; 1 Dill. Mun. Corp., sec. 328.) 'Regard must be had to all the circumstances of the particular city, the objects sought to be obtained, and the necessity which exists for the ordinance.' (*Id.*, sec. 327.) *It is common knowledge that thieves resort to these places to dispose of their stolen goods, and that unscrupulous, and oftentimes criminal, persons are engaged in the business. The business, therefore, comes expressly within the control of the police power of the state, and is properly subject to reasonable rules and regulations. A very clear abuse of this power must be shown in order to justify the court in declaring the regulations to be unreasonable and void. While this business is legitimate in the absence of any statute law controlling it, no inalienable right exists to carry it on without complying with those provisions and restrictions which the legislative power of the state has seen fit to require.*

* * * * *

"*The business is not necessary to the welfare of society or the public.* The common council, with the knowledge of all the facts before them to a greater extent than the courts can possibly have, have determined that it is well, in their judgment, to require these conditions. While the exercise of any arbitrary power may seem harsh, still we are of the opinion that this requirement is not so unreasonable as to require the courts to declare it void."

The supreme court of Californin, in *Levison vs. Boas*, 88 Pac. 825, cites the foregoing authorities with approval, saying:

"And first as having to do with the question it is to be noted that the business of a pawnbroker is one which has always been regarded as subject to police regulation for the benefit of the public and to prevent frauds upon it."

The Virginia supreme court, in *Elsner Bros. vs. Hawkins*, 73 S. E. 479, makes a similar statement as to this occupation:

"The business of pawnbroker, because of the facility it furnishes for the commission of crime and for its concealment, is one which belongs to a class where the strictest police regulation may be imposed. This is shown by our legislation, both state and local, on the subject and by the adjudications of courts (citing authorities)."

In *Grossman vs. Indianapolis*, 88 N. E. (Ind.) 945, an ordinance licensing the business of junk dealer, which occupies a status similar to that of pawnbroker, was reviewed by the supreme court of Indiana, which said:

"The right to pursue the business of a junk dealer is not inalienable, but, by the state, may be restricted to any extent deemed proper or wholly denied. In the absence of prohibitory legislation, it is legitimate, and in seeking to prevent waste and conserving old and worn-out materials is beneficial; but it is not absolutely essential to the welfare of society. In the case last above cited, in speaking of junk dealers and their places of business, the court said: 'It is common knowledge that thieves resort to

these places to dispose of their stolen goods, and that unscrupulous, and oftentimes criminal, persons are engaged in the business.' *The business comes clearly within the scope of the police power of the state, and those engaged in it must know that in pursuing such calling they are exercising a personal privilege, rather than an absolute right, without any guaranty or contract, express or implied, for its definite continuance.* The purpose actually the enactment of provisions regulating such business are the highest that can concern organized society. *The objects, among others, are to prevent both old and young from entering upon a tempting species of petty thievery, to expose dishonest and criminal practices in receiving and concealing stolen property, to assist in reclaiming and restoring such property to the rightful owner, and to facilitate the detection and punishment of thieves.* The state has placed junk dealers under the ban of a license, and has authorized cities still further to tax, license, and regulate their business. The courts are slow to declare any police ordinance invalid as unreasonable, when the power to legislate upon the subject has been expressly conferred upon the common council, and certainly a very clear abuse of power must be shown to justify a court in declaring void provisions so vital to the good of society as those here involved."

The Missouri court in *St. Louis vs. Baskowitz*, 201 S. W. (Mo.) 870, in speaking of the business of junk dealers, quoted with approval its decision in *St. Joseph vs. Levin*, *supra*, relative to pawnbrokers, and said in answer to the contention that the ordinance imposed regulations which were practically impossible of being observed:

"This contention is not sound, for the reason heretofore stated, namely, *that the appellant has no inalienable right to conduct a junk shop within the meaning of the constitution, but only has a privilege to so do which may be regulated or absolutely denied under the police power of the state exercised for the preservation of the lives and property of the people of the city and for the protection of the public health, safety and morals thereof.*"

The supreme court of Washington in *Seattle vs. Barto*, 31 Wash. 141, 71 Pac. 735, characterized this business as follows:

"It is not doubted that the business of pawnbroking is a proper subject of police regulation, nor is it doubted that it is within the province of the municipal authorities to make the business bear the costs of such regulation."

The history of pawnbroking, especially in England, shows that the suspicion with which the courts have regarded this occupation is not without foundation. Pawnbroking first came to England at the time of William the Conqueror and still existed there under certain restrictions and disadvantages at the time of the adoption of our Constitution. Pawnbrokers were first licensed in 1785, which was but two years prior to the framing of the Constitution. It will therefore be seen that prior to the existence of our present Government, pawnbroking, both in England and in her colonies, was regarded as a menace to the public welfare unless conducted under licenses and restrictions. The *Encyclopedia Britannica* (11th Ed.), vol. 10, at page 973, contains the following statement as to the status of this occupation in England during the 17th and 18th centuries:

"Throughout both the 17th and 18th centuries the general suspicion of the pawnbroker appears to have been only too well founded. It would appear from the references Fielding makes to the subject in *Amelia*, which was written when George II was on the throne, that, taken in the mass, he was not a very scrupulous tradesman. Down to about that time it had been customary for publicans to lend money on pledges that their customers might have the means of drinking, but the practice was at last stopped by

act of Parliament. Nor was respect for the honesty of the business increased by the attempt of 'The Charitable Corporation' to conduct pawnbroking on a large scale. Established by charter in 1707, 'this nefarious corporation', as Smollett called it, was a swindle on a large scale. The directors gambled wildly with the shareholders' money, and in the end the common council of the City of London petitioned Parliament for the dissolution of this dishonest concern, on the ground that 'the corporation, by affording an easy method of raising money upon valuables, furnishes the thief and pickpocket with a better opportunity of selling their stolen goods, and enables an intending bankrupt to dispose of the goods he buys on credit for ready money, to the defrauding of his creditors.'

The experience of the common council of the City of London, as shown by the foregoing quotation, has a remarkable similarity to the views relative to pawnshops expressed by the courts of this country in the cases hereinbefore cited.

While so far as our investigation discloses, this court has never had occasion to pass upon the status of pawnbroking under the police power, it has discussed the power of the state to prohibit inherently vicious and non-useful occupations.

In *Crowley vs. Christensen*, 137 U. S. 86, 34 L. Ed. 620, the distinction between the retail liquor business and that of operating a laundry (discussed in *Yick Wo vs. Hopkins*, 118 U. S. 356, 30 L. Ed. 220) is pointed out:

"It will thus be seen that that case was essentially different from the one now under consideration, the ordinance there held invalid vesting uncontrolled discretion in the board of supervisors with reference to a business harmless in itself and useful to the community; and the discretion appearing to have been exercised for the express purpose of depriving the petitioner of a privilege that was extended to others. *In the present case the business is not one that any person is permitted to carry on without a license, but one that may be entirely prohibited or subjected to such restrictions as the governing authority of the city may prescribe.*"

In that decision it was strongly intimated that the municipal authorities might pick and choose between applicants for licenses and grant licenses only when deemed proper.

Later, in *Booth vs. Illinois*, 184 U. S. 425, 46 L. Ed. 623, this court in speaking of the business of dealing in options to sell grain in the future, said:

"A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the state thinks that certain admitted evils can not be successfully reached unless that calling be actually prohibited, the courts can not interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

In *Murphy vs. California*, 225 U. S. 623, 56 L. Ed. 1229, an ordinance prohibiting the business of conducting a poolroom was upheld on account of the character of the business. It was there said:

"The Fourteenth Amendment protects the citizen in his right to engage in

any lawful business, but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many nonuseful occupations which may or may not be harmful to the public, according to local conditions, or the manner in which they are conducted.

The court on November 12, 1923, decided the case of *Terrace vs. Thompson*, U. S. Adv. Ops. 1923-1924, p. 35, 68 L. Ed. —, in which the rights of aliens with respect to the police power of the state were defined as follows:

"The Fourteenth Amendment, as against the arbitrary and capricious or unjustly discriminatory action of the state, protects the owners in their right to lease and dispose of their land for lawful purposes, and the alien resident in his right to earn a living by following ordinary occupations of the community, *but it does not take away from the state those powers of police that were reserved at the time of the adoption of the Constitution.* (*Barbier vs. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357; *Mugler vs. Kansas*, 123 U. S. 623, 663, 31 L. Ed. 205, 211, 8 Sup. Ct. Rep. 273; *Powell vs. Pennsylvania*, 127 U. S. 678, 683, 32 L. Ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Re Demmler*, 136 U. S. 436, 449, 34 L. Ed. 519, 524, 10 Sup. Ct. Rep. 930; *Lawton vs. Steele*, 152 U. S. 133, 136, 38 L. Ed. 385, 388, 14 Sup. Ct. Rep. 499; *Phillips vs. Mobile*, 208 U. S. 472, 479, 52 L. Ed. 578, 581, 28 Sup. Ct. Rep. 370; *Hendrick vs. Maryland*, 235 U. S. 610, 622, 623, 59 L. Ed. 385, 390, 391, 35 Sup. Ct. Rep. 140.) And in the exercise of such powers the state has wide discretion in determining its own public policy and what measures are necessary for its own protection and properly to promote the safety, peace, and good order of its people."

The ordinance involved in this case merely restricts the privilege of engaging in this unnecessary and inherently vicious occupation to citizens of the United States. Since, under the authorities cited, the city council could have prohibited the occupation entirely, it can limit its exercise to citizens of the United States without violating the Fourteenth Amendment nor the guaranties contained in the Japanese treaty.

V.

EQUAL PROTECTION OF THE LAWS.

Licenses to Engage in Businesses Which Are Privileges May Be Granted to Citizens and Denied to Aliens.

Coming now to the question of alleged unlawful discrimination, it has been held in numerous cases that, if the business is one that may be prohibited, alienage may justify the denial of the privilege. Of course a state can not discriminate between aliens and citizens in respect to those useful businesses which every person may follow as of right, as was held in the case of *Truax vs. Raich*, 239 U. S. 33, 60 L. Ed. 131 (relied upon by plaintiff in error). However, as we have already seen, pawnbroking is a privilege.

In *People vs. Crane*, 108 N. E. (N. Y.) 427, a restriction on the privilege of laboring on public works to citizens of the United States was upheld and the rule was stated in the following language:

"If the calling is one that the state, in the exercise of its police power, may prohibit either absolutely or conditionally by the exaction of a license, *the fact of alienage may justify a denial of the privilege.* (Citing authorities.)"

That case was affirmed by this court in *Crane vs. New York*, 239 U. S. 195, 60 L. Ed. 218, with the following comment:

"The contentions of plaintiff in error are based on the treaties and on the Fourteenth Amendment of the Constitution of the United States. The specifications of error are the same, though varying in expression, as those in the Heim case, and there considered and declared untenable. *There is added the view that a distinction made between aliens and citizens violates the principle of classification. We think this view is also without foundation.*"

The principal decision was rendered at the same time in the companion case of *Heim vs. McCall*, 239 U. S. 175, 60 L. Ed. 206.

In Massachusetts a statute providing that no one could become a peddler unless duly licensed and restricting the granting of licenses to citizens was upheld, the court saying:

"There is, however, an important question which was not much discussed in that case, whether the legislature, in the exercise of the police power, could discover a reason for withholding peddlers' licenses from aliens. The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation. That such regulation has been practiced from early times, both in Europe and America, is shown at length by Mr. Justice Gray in *Emert vs. State of Missouri*, 156 U. S. 295, 15 Sup. Ct. 367, 39 L. Ed. 430. The requirement of Rev. Laws, c. 65, sec. 19, that before receiving a license the appellant shall file a certificate from the mayor of a city or the majority of the selectmen of a town that to the best of his or their knowledge and belief he is of good repute for morals and integrity, is a reasonable regulation for the protection of the public. If, in the same interest, the legislature deems it important that licenses shall be granted only to citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect. Upon a similar question in reference to the granting of licenses to sell intoxicating liquors, decided in *Trageser vs. Gray*, 73 Md. 250, 254, 255, 257, 20 Atl. 905, 906 (9 L. R. A. 780, 25 Am. St. Rep. 587), the court used this language: 'It is thought proper to confine the license to citizens of the United States, of temperate habits and good moral character. The privilege is very liable to be abused, and abuses would produce great public detriment. *It therefore seemed wise to the legislature to confer it only on those who, being natives of the country, may reasonably be supposed to have a regard for its welfare, or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice that they were attached to the principles of the Constitution of the United States and were well disposed to their good order and happiness.* It was certainly the function of the lawmaking department to exercise its judgment on this question, and this court has no right to criticize its conclusion. (*Commonwealth vs. Hana*, 81 N. E. [Mass.] 149.)

In *Trageser vs. Gray*, 20 Atl. (Md.) 905, a statute providing that licenses to sell liquor at retail should be granted only to citizens of the United States was upheld.

The last two cases cited were quoted with approval in *Bloomfield vs. State*, 99 N. E. (Ohio) 309, the court saying:

"We do not think the statutes of Ohio and of other states which have barred aliens from the liquor traffic in the manner stated have arisen from a spirit of race hatred or inhospitality, or a purpose to deny the equal protection of our laws or equal opportunity under our institutions. But they are based on the belief that an alien can not be sufficiently acquainted with our institutions and our life to enable him to appreciate the relation of this particular business to our entire social fabric. When he has become

more familiar with the spirit of the American people and their laws and has become a citizen, he will easily and readily (in the conduct of the business) assist in the furtherance of the policy of the state."

The wisdom of the views expressed in these decisions and the wisdom of the city council in limiting pawnbroking to citizens find support in the 1922 report of the committee on law enforcement of the American Bar Association which, after pointing out the large number of crimes of violence committed in this country, says:

"On the other hand, in crimes which indicate the dishonesty of the people, such as larceny, extortion, counterfeiting, forgery, fraud and other crimes of swindling, a comparison of conditions demonstrates that *the morals of this country are better than in any other of the large countries of the world. The American people are an honest people*; commercial integrity here works to a higher standard than in any other land, the morality of the country is higher, the lives of its citizens are cleaner, offenses against women and children are less frequent and more universally abhorred." (Reports of American Bar Association, vol. XLVII, p. 429.)

In *Morin vs. Nunan*, 103 Atl. (N. J.) 378, this rule was applied to the privilege of operating a motor vehicle for hire in the public streets. After distinguishing the case of *Truax vs. Raich*, 239 U. S. 33, 60 L. Ed. 131, the court said:

"We think that the operation of vehicles for the transportation of passengers for hire on the public streets of the township is a privilege subject to the control of the township. It is not one of those inalienable rights which belong to human beings, a right to labor for a living."

The supreme court of Washington held, in *State vs. Ames*, 47 Wash. 328, 92 Pac. 137, that the privilege of piloting ships in the waters of the state could be properly limited to citizens.

It is further to be noted that the ordinance in this case does not discriminate between the Japanese and any other class of aliens; it is applicable to all aliens alike. Plaintiff in error complains because, not being eligible to naturalization, he can never procure a pawnbroker's license. That, however, is a matter over which the City of Seattle has no control. That he is not considered worthy of citizenship is a complaint addressed, not to the city council, but to the Federal Government, upon whose treaty he relies. Should Congress see fit to permit Japanese to become citizens, the plaintiff in error would be eligible for a license under the ordinance. However, this court has very recently held that Congress has not yet done so: *Ozawa vs. United States*, Adv. Ops. 1922-1923, p. 11, 67 L. Ed. —; *Yamashita vs. Hinkle*, Adv. Ops. 1922-1923, p. 15, 67 L. Ed. —.

That the classification adopted by the city council in the present case does not deny the plaintiff in error equal protection of the laws is conclusively shown by the recent decision in *Terrace vs. Thompson*, U. S. Adv. Ops. 1923-1924, p. 35, 68 L. Ed. —, where it was said:

"Eligible aliens are free white persons and persons of African nativity or descent. Congress is not trammelled, and it may grant or withhold the privilege of naturalization upon any grounds or without any reason, as it sees fit. But it is not to be supposed that its acts defining eligibility are arbitrary or unsupported by reasonable considerations of public policy. *The state properly may assume that the considerations upon which Congress made such classification are substantial and reasonable.* Generally speaking, the natives of European countries are eligible. Japanese, Chinese, and Malays are not. Appellants' contention that the state act discriminates arbitrarily, against Nakatsuka and other ineligible aliens because of their race and color is without foundation. All persons of whatever color or race who have not

declared their intention in good faith to become citizens are prohibited from so owning agricultural lands. Two classes of aliens inevitably result from the Naturalization Laws—those who may and those who may not become citizens. *The rule established by Congress on this subject, in and of itself, furnishes a reasonable basis for classification in a state law withholding from aliens the privilege of land ownership as defined in the act. We agree with the court below (274 Fed. 841, 849) that: 'It is obvious that one who is not a citizen and can not become one lacks an interest in, and the power to effectually work for the welfare of, the state; and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens.' And we think it is clearly within the power of the state to include nondeclarant eligible aliens and ineligible aliens in the same prohibited class. Reasons supporting discrimination against aliens who may, but who will not, naturalize, are obvious.*"

In *Frick vs. Webb*, U. S. Adv. Ops. 1923-1924, p. 112, 68 L. Ed. —, this court upheld a state statute prohibiting ineligible aliens from owning stock in a corporation authorized to own or lease agricultural land. Mr. Justice Butler in delivering the opinion of the court used the following language:

"The state has power, and the act evidences its purpose, to deny to ineligible aliens permission to own, lease, use or have the benefit of lands within its borders, for agricultural purposes. (*Webb vs. O'Brien, supra.*) 'As the state has the power * * * to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of that power effective.' (*Crane vs. Campbell*, 245 U. S. 304, 307, 62 L. Ed. 304, 309, 38 Sup. Ct. Rep. 98, and cases cited; *Hebe Co. vs. Shaw*, 248 U. S. 297, 303, 63 L. Ed. 255, 258, 39 Sup. Ct. Rep. 125.) It may forbid indirect as well as direct ownership and control of agricultural land by ineligible aliens. The right 'to carry on trade' given by the treaty does not give the privilege to acquire the stock above described. To read the treaty to permit ineligible aliens to acquire such stock would be inconsistent with the intention and purpose of the parties. We hold that the provisions of section 3, above referred to, does not conflict with the Fourteenth Amendment or with the treaty."

See, also, *Webb vs. O'Brien*, U. S. Adv. Ops. 1923-1924, p. 109, 68 L. Ed. —, which distinguishes *Truax vs. Raich*, 238 U. S. 33, 60 L. Ed. 131, from such a case as the one at bar.

The basis of classification between aliens and citizens being a proper one, the ordinance is not invalid because Congress has so far failed to make Japanese subject to naturalization.

Furthermore, the burden of showing that the classification complained of does not rest upon any reasonable basis, is upon the plaintiff in error.

In *Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. Ed. 369, this court stated the rule as follows:

"The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law

is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. *One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.*"

In order to constitute an unlawful discrimination, it must be shown that there could be no reasonable connection between excluding aliens from engaging in the business of pawnbroking and the end sought to be attained, namely, the proper regulation of this occupation which is recognized by the courts as being so detrimental to the public welfare. The legislators had a right to presume that pawnbroking would be conducted by citizens with less harm to the public welfare than when conducted by aliens. In any event, this court can not substitute its judgment upon this question for that of the legislative body. This rule has been many times announced by this court.

In the recent case of *Crescent Cotton Oil Co. vs. Mississippi*, 257 U. S. 129, 66 L. Ed. 166, is found the following expression:

"This would be sufficient to dispose of this second contention, but we may add that the law assailed was enacted by the state in the exercise of its police power to prevent a practice conceived to be promotive of monopoly, with its attendant evils. It is clearly settled that any classification adopted by a state in the exercise of this power which has a reasonable basis, and is therefore not arbitrary, will be sustained against an attack based upon the equal protection of the laws clause of the Fourteenth Amendment, and also that every state of facts sufficient to sustain such classification which can be reasonably conceived of as having existed when the law was enacted will be assumed."

In *Heister vs. Thomas Colliery Co.*, Adv. Ops. 1922-1923, p. 119, the rule is again stated in the following language:

"In other cases it is said that facts which can be reasonably conceived of as having existed when the law was enacted will be assumed to justify it. (*Lindsley vs. Natural Carbonic Gas Co.*, 220 U. S. 61, 78, 55 L. Ed. 369, 377, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *Crescent Oil Co. vs. Mississippi*, 257 U. S. 129, 137, 66 L. Ed. 166, 42 Sup. Ct. Rep. 42.) And 'it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety.' (*Rast vs. Van Deman & L. Co.*, 240 U. S. 342, 357, 60 L. Ed. 679, 687, L. R. A. 1917A, 421, 36 Sup. Ct. Rep. 370, and cases there cited.) And, further, the purpose of the legislation may not be the correction of some definite evil, but may be only to remove 'obstacles to a greater public welfare.'

"See, also, as to classification by legislation and its consonance to the requirements of the Fourteenth Amendment, *District of Columbia vs. Brooke*, 214 U. S. 138, 150, 53 L. Ed. 941, 945, 29 Sup. Ct. Rep. 560."

See, also, *Sweet vs. Rechel*, 159 U. S. 380, 40 L. Ed. 188; *Home Telephone & Telegraph Co. vs. Los Angeles*, 211 U. S. 264, 53 L. Ed. 176; *Rast vs. Van Deman*, 240 U. S. 342, 60 L. Ed. 679.

We refer in passing to the case of *State vs. Ware*, 154 Pac. (Ore.) 905, in which a statute forbidding non-residents to loan money at a rate of interest greater than 10 per cent and permitting residents to do so was upheld.

From what has been said, it will be observed that there is no unlawful discrimination in the ordinance in question, and that it does not deny the plaintiff in error equal protection of the law, contrary to the provisions of the Fourteenth Amendment.

VI.

SCOPE OF THE TREATY-MAKING POWER.

The Federal Government Through the Treaty-Making Power Cannot Restrict the Police Power of a Sovereign State.

Before considering the provisions of the Japanese treaty applicable to this case, it is proper to consider the scope of the treaty-making power. In one of the most recent cases upon this subject, *Missouri vs. Holland*, 252 U. S. 416, 64 L. Ed. 641, this court said:

"It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way."

If it be the meaning of the decision in that case that the treaty-making power is not limited by the other provisions of the Constitution, then our argument upon this branch of the case is in opposition to that decision. However, we think it is open to question, whether a majority of this court intended to so hold in that case.

So far as our investigation disclosed, the only opinion of a member of this court which squarely passes upon the relation between the treaty-making power of the Federal Government and the police power of the states is that of Mr. Justice Daniel, in the License cases, 5 How. 505, 12 L. Ed. 256. The learned justice there concurred in the conclusion reached by his associates, but based his opinion upon a different ground. Upon the subject now under discussion, he said:

"By the 6th article and the 2d clause of the Constitution it is thus declared: 'That this Constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land.'

"This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal Government must be expounded in coincidence with a perfect right in the states to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the General Government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. *Treaties, to be valid, must be made within the scope of the same powers; for there can be no 'authority of the United States,' save what is derived mediately or immediately, and regularly and legitimately, from the Constitution.* A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or of any citizen of a state."

Mr. Chief Justice Taney in his dissenting opinion in the Passenger cases, 7 How. 283, 12 L. Ed. 702, expressed a similar view, and Mr. Justice Daniel in that case approvingly quoted the above portion of his former opinion. Although these last referred to opinions were minority opinions, that of a majority does not seem to disagree with them upon this point.

Another expression of this court to the effect that the treaty-making power is limited by the other provisions of the Constitution and by the

peculiar nature of our form of government is found in *De Geofroy vs. Riggs*, 133 U. S. 267, 33 L. Ed. 642, and is as follows:

"That the treaty power of the United States extends to all proper subjects of negotiation between our Government and the governments of other nations is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited *except by those restraints which are found in that instrument against the action of the Government or of its departments and those arising from the nature of the government itself and of that of the states.* It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent."

Mr. Justice White rendered a special concurring opinion in *Downes vs. Bidwell*, 188 U. S. 244, 45 L. Ed. 1088, which had the approval of Justices Shiras and McKenna. The opinion points out that the treaty-making power must be interpreted with reference to the nature of our Government and in harmony with related provisions of the Constitution. In the course of this opinion, it was said:

"Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation, which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded—that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution—it seems to me impossible to conceive that the treaty-making power by a mere cessation can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. *If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions.* If the proposition be true, then millions of inhabitants of

alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the government be overthrown. While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted—vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.”

In *Compagnie Francaise vs. State Board of Health*, 25 So. (La.) 591, the supreme court of Louisiana in upholding a state quarantine law as against certain treaties said:

“The treaties and laws of the United States must be held to have been passed with reference to, and subsidiary to, the rightful exercise of the police power by the different states in aid of the protection and preservation of the public health within their respective borders.”

This decision was affirmed by this court in 186 U. S. 580, 46 L. Ed. 1209, it being intimated that a treaty could not operate so as to invalidate a state quarantine law. The pertinent portion of this court’s opinion is as follows:

“Conceding, *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that they were not intended to, and did not, deprive the Government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people. We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the Government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress.”

Justice Sawyer, in *In re Wong Young Quy*, 2 Fed. 624, expressed doubt as to whether the treaty-making power could abridge the police power of the state, saying:

“Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices, under the guise of religious sentiment, deleterious to the public health or morals, or to a subject matter within the acknowledged police power of the state.”

A similar view was expressed in *Cantini vs. Tillman*, 54 Fed. 969, in the following language:

“We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the Fourteenth Amendment; that it is within the police power. *The police power is a right reserved by the states, and has not been delegated to the General Government. In its lawful exercise, the states are absolutely sovereign. Such exercise can not be affected by any treaty stipulations. ‘Salus populi suprema lex.’*”

The supreme courts of California and New Hampshire expressed themselves in no uncertain terms upon this question.

In *People vs. Naglee*, 1 Cal. 232, the contention was advanced that a state statute requiring foreigners to pay a license to operate a mine violated

rights guaranteed by a certain treaty. The court dealt with this contention as follows:

"But even if the provisions of the statute did clash with the stipulations of that or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had given up that power to the General Government. If the state retains the power then the President and Senate can not take it away by treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it can not supersede a state law which enforces or exercises any power of the state not granted away by the Constitution. To hold any other doctrine than this would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation."

The same court in the later case of *Siemssen vs. Bofer*, 6 Cal. 250, speaking through Chief Justice Murray, said:

"Where, let it be asked, is the exercise of this power to end, and who is to be the judge whether the objects intended to be compassed are strictly within the treaty-making power? Already have we witnessed in this state one disgraceful exhibition of the extent to which the power may be claimed; and the right of a party to be confronted with his witnesses, and have process for their attendance in court, a right guaranteed by the Constitution and laws of the United States, and the State of California, is claimed to have been abrogated by treaty stipulations with France.

"It can not be contended, with any show of reason, that the Federal Government took this grant of power in the enlarged sense in which it is exercised by England, and the nations on the continent of Europe; or that she is vested with the same plenary powers that the individual states were before the adoption of the Constitution.

"The political structure of our Government forbids such an idea. The power must be construed in reference to the powers delegated to the United States, and those reserved to the states, and must be further limited to objects which are the peculiar and proper subject matter of treaty stipulation.

"The exercise of this power under the Constitution can scarcely extend beyond that of declaring war, making peace, regulating commerce, and adjusting national misunderstandings or differences; and for the execution of such purposes, the power to alter the rules of descent, to change the domestic policy of a state, and to alter the laws of evidence are not incidents, any more than the right to abolish slavery, or any of the other acts we have enumerated."

The same opinion was expressed in *Pierce vs. State*, 13 N. H. 536, it being there said:

"Thus the general power to make treaties confers authority to negotiate compacts relative to the proper subject matters of treaty stipulation, such as peace, war, commercial intercourse, alliances, etc. A treaty has been defined to be 'a compact of accommodation relating to public affairs,' but the

political rights of the people of the several states, as such, are not subjects of treaty stipulation. It needs no argument to prove that an attempt on the part of the United States, by compact with a foreign government, to qualify the right of suffrage in a state, prescribe the time and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void; and an agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and peddlers, would be of the same character. The police power of the several states, regarded as separate governments, is not a subject matter to which the treaty-making power extends."

It seems to us that the framers of the Constitution intended that the treaty-making power, which was vested in the President and the Senate, should be exercised subject to the limits imposed by that instrument. If Congress and the President can not enact a statute which violates the Tenth Amendment, how can the President and the Senate, together with some alien minister or other diplomatic representative, enter into a treaty which has that effect? The decision in *Missouri vs. Holland*, *supra*, intimates that such is the case, but even if the broad statement referred to be correct, the facts of that case are distinguishable from the present case in that the subject matter was not local and internal.

The Tenth Amendment declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people." As was said by Mr. Justice Brewer in *Kansas vs. Colorado*, 206 U. S. 46, 51 L. Ed. 956:

"The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. *This article 10 is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning.*"

One of the powers reserved to the state (which is to be liberally construed) is the police power, pursuant to which a state may prohibit callings dangerous to the public. If, as the authorities heretofore cited hold, the state in such cases may restrict those engaged in such callings to citizens, then the President, Senate, and the representative of a foreign government can not thus limit the police power of the state by entering into a treaty. A treaty made within the scope of the treaty-making power is declared by the Constitution to be the supreme law of the land, but when it transcends the purpose for which that power was delegated to the National Government, it is to that extent void.

If the treaty-making power should be declared to be not limited by the other provisions of the Constitution, then it becomes a convenient substitute for congressional legislation in fields over which Congress has no jurisdiction. As this court knows, a treaty is usually drafted secretly by the

state department or commissioners appointed by the President, in conference with some foreign representative. After it is agreed upon by the diplomats it is sent to the President, who, if satisfied with it, transmits it to the Senate. There it is generally considered at a secret session. If ratified by the Senate it is then proclaimed by the President and the people are at that time, after the obligations provided in it have been assumed by the United States, for the first time permitted to know its contents.

By referring to these practical considerations, we do not mean to argue that the possible abuse of a power is an argument against its existence, but we think that these considerations are very pertinent in determining the intent of the people in adopting the Tenth Amendment. If a treaty can take away part, or all, of the police power of the state, then the Tenth Amendment is of no avail and the safeguard which the people put upon their right to govern themselves in matters of local concern is nugatory.

It has always been the policy of this court to preserve our dual form of government in the same form in which it was originally created by the people, and this court has always restrained attempts on the part of either the Federal Government or the states to encroach upon or impair the powers of the other.

In the Slaughter House cases, 83 U. S. 36, 21 L. Ed. 394, it was held that Congress had no power to legislate directly in regard to local affairs of the states by virtue of the adoption of the Fourteenth Amendment. Recently this court has held that the Federal Government can not exercise its power to regulate commerce for the purpose of controlling matters of state concern (*Hammer vs. Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101); and more recently has held that the power of internal revenue taxation can not be misused for that purpose (*Bailey vs. Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817). The only remaining means for the Federal Government to impair the police power of the states is by treaty. Will this court now hold that the treaty-making power is unlimited by the Tenth Amendment?

The closing words of Mr. Justice Miller in rendering the opinion of the court in the Slaughter House cases, 83 U. S. 36, 21 L. Ed. 394, concerning the relation between our state and Federal Government still proclaim the policy of this court upon this subject. He said:

"But, whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and an even hand, the balance between the state and federal power, and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or any of its parts."

VII.

CONSTRUCTION OF THE JAPANESE TREATY.

The Japanese Treaty Does Not Guarantee the Privilege of Engaging in Pawnbroking.

In advancing our seventh and last branch of the argument, we will assume, for argument's sake, that the Federal Government can by making a treaty impair or limit the state's police power. Nevertheless, the treaty involved in this case can not reasonably be construed as guaranteeing to the plaintiff in error the privilege of pursuing a calling which may not be entered as of right.

It is to be noted, in passing, that the Japanese treaty does not contain a "most favored nation" clause, except as to commerce and navigation.

The portion of the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, which is chiefly relied upon, reads as follows:

"The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other, *to carry on trade, wholesale and retail*, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established." (37 Stat. at L. 1504.)

The term "trade" as used in the treaty, means dealing in commodities as a buyer or seller, but can not reasonably be held to include the indiscriminate loaning of money upon pledge of personal effects.

The word "trade" has been several times judicially so defined: *May vs. Sloan*, 101 U. S. 231, 25 L. Ed. 797; *State vs. Krech*, 10 Wash. 166, 38 Pac. 1001.

Bouvier's Law Dictionary (8th Ed.) defines trade as, "any sort of dealings by way of *sale or exchange*; commerce, traffic."

Webster's International Dictionary gives, among others, the following definition:

"Act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic. *Trade*, in this sense, comprehends every species of exchange or dealing, either in the produce of land in manufactures, in bills, or in money; but it is chiefly used to denote the barter or purchase and sale of goods, wares, and merchandise, either by wholesale or retail."

The Encyclopedia Britannica (11th Ed.), volume 27, at page 127, defines the term as follows:

"*Trade* (O. Eng. trod, footstep, from *tredan*, to tread; in M. Eng. the forms *tred*, *trod* and *trade* appears, the last in a sense of a beaten track), originally a term meaning track or course, and so surviving in 'trade-wind' (q. v.), a wind which always blows in one course; hence a way of life, business or occupation, and, specifically, the handicraft in which a man has been trained and which he makes his means of livelihood, or the mercantile business which he carries on for profit, as opposed to the liberal arts or professions. A further development of meaning makes the word synonymous with commerce, comprehending every species of exchange or dealing in commodities."

Speaking of the scope and purpose of the Japanese treaty involved in this case, this court recently said in *Terrace vs. Thompson*, U. S. Adv. Ops. 1923-1924, page 35:

"The state act, in our opinion, is not in conflict with the treaty between the United States and Japan. The preamble declares it to be 'a treaty of commerce and navigation,' and indicates that *it was entered into for the purpose of establishing the rules to govern commercial intercourse between the countries.*

"* * * The right to 'carry on trade,' or 'to own or lease and occupy houses, manufactories, warehouses, and shops,' or 'to lease land for residential and commercial purposes,' or 'to do anything incident to or necessary for trade,' can not be said to include the right to own or lease, or to have any title to or interest in, land for agricultural purposes. The

enumeration of rights to own or lease for other specified purposes impliedly negatives the right to own or lease land for these purposes. A careful reading of the treaty suffices, in our opinion, to negative the claim asserted by appellants that it conflicts with the state act."

The plaintiff in error in his brief quotes at length from a memorandum-decision of a superior court judge of Los Angeles County in the unreported case of *State vs. Tagami*. In that decision the court of first instance concludes that the leasing of land by a Japanese for the purpose of conducting a health resort and sanatorium is a "residential and commercial purpose" within the meaning of the Japanese treaty. The case did not call for an interpretation of the phrase "to carry on trade" which is here involved. Furthermore, an appeal has been taken to the supreme court of California, where the liberal views of the *nisi prius* court may be modified by the adoption of a common sense interpretation of the treaty. However that may be, this court has already placed its own interpretation on this treaty, holding that its purpose was to govern commercial intercourse with Japan. (*Terrace vs. Thompson, supra.*)

See, also, *Frick vs. Webb*, U. S. Adv. Ops. 1923-24, p. 112, 68 L. Ed. —; *Webb vs. O'Brien*, U. S. Adv. Ops. 1923-24, p. 109, 68 L. Ed. —.

It would surely do violence to the intention of the signatories to this treaty to hold that they intended, by the use of this term, to secure to the plaintiff in error the privilege of conducting a pawnshop in the United States. While treaties must be construed liberally to make effective the intention of the parties, yet a strained construction such as suggested by plaintiff in error should not be indulged in. We submit that pawnbroking was not intended to be included in the word "trade" as used in the treaty, and that it can not properly be said to be incidental to trade. We agree with plaintiff in error that the word "trade" is used in the ordinary acceptance of the term, but we challenge him to cite an instance where the word "trade" was ever used to describe the act of pawning or the term "tradesman" to designate a pawnbroker.

There is a further reason why the treaty does not apply to the case at bar. This is aptly illustrated in at least two decisions of this court. It has already been demonstrated that pawnbroking is a privilege. This being so, the provisions of the treaty are inapplicable.

In *Patson vs. Pennsylvania*, 232 U. S. 138, 58 L. Ed. 539, it was contended that an act of the State of Pennsylvania forbidding a foreign-born person to shoot wild game, and to that end prohibiting such person from owning or being in possession of a shotgun or rifle, was in violation of a treaty with Italy containing language similar to our treaty with Japan.

The act was upheld because the thing prohibited was a privilege and therefore not guaranteed by the treaty. Mr. Justice Holmes, in delivering the opinion of the court, said:

"The defense under the treaty with Italy of February 26, 1871 (17 Stat. at L. 845), appears to us to present less difficulty. The provisions relied upon are those in article 2, giving to citizens of Italy-the right to carry on trade and to do anything incident to it upon the same terms as the natives of this country; in article 3, assuring them security for persons and property, and that they 'shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives;' and in article 24, promising to the Kingdom of Italy the same favors in respect to commerce and navigation that may be granted to other nations. We will say a word about each.

"The last article is supposed to make applicable a convention with Switzerland providing against more burdensome conditions being imposed upon the residence of Swiss than upon that of citizens. But article 24 refers only to commerce and navigation, and the case must stand wholly upon articles 2 and 3. As to article 2, it will be time enough to consider whether the statute can be construed or upheld as precluding Italians from possessing a stock of guns for purposes of trade when such a case is presented. The act was passed for an object with which possession in the way of trade has nothing to do, and well might be interpreted as not extending to it. There remains, then, only article 3. With regard to that it was pointed out below that the equality of rights that it assures is equality only in respect of protection and security for persons and property. The prohibition of a particular kind of destruction and of acquiring property in instruments intended for that purpose establishes no inequality in either respect. *It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for its own citizens if it pleases.* (Geer vs. Connecticut, 161 U. S. 519, 529, 40 L. Ed. 793, 797, 16 Sup. Ct. Rep. 600.) *We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent.* (Compagnie Francaise de Navigation a Vapeur vs. State Board of Health, 186 U. S. 380, 394, 46 L. Ed. 1209, 1216, 1217, 22 Sup. Ct. Rep. 811.)"

Again in *Heim vs. McCall*, 239 U. S. 175, 60 L. Ed. 206, a similar conclusion was reached. This court in that case had under consideration a statute of the State of New York providing that in the construction of public works only citizens of the United States should be employed. It was contended that this act was in violation of the treaty with Italy, which was discussed in the case last cited. After holding that to labor upon public works was a privilege and not a right, the opinion says:

"Construing the provision of 1871, the court of appeals decided that it 'does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.' The conclusion is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligation of treaties when made. The present case is concerned with construction, not power; and we have precedents to guide construction. The treaty with Italy was considered in *Patson vs. Pennsylvania*, 232 U. S. 138, 145, 58 L. Ed. 539, 544, 34 Sup. Ct. Rep. 281, and a convention with Switzerland (as in the present case) which was supposed to become a part of it. It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign-born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens. *In other words, the ruling was given point by the special power of the state over the subject matter—a power which exists in the case at bar, as we have seen.*" (See, also, *Bondi vs. Mackay*, 89 Atl. Vt. 228, 231.)

If (as the decisions hereinbefore cited hold) engaging in pawnbroking is a privilege, and not a right, then, under the two decisions of this court, just referred to, the language of the Japanese treaty has no application. Article 1 of the treaty, upon which reliance is principally placed, merely

guarantees to a subject of Japan lawfully residing in this country the right to carry on trade upon the same terms as our own citizens. If, as this court has held, such language in a treaty does not include the privilege of shooting wild game, or laboring on public work, then by no reasonable construction can this treaty be held to guarantee to the plaintiff in error the privilege of engaging in pawnbroking.

CONCLUSION.

From the foregoing authorities it will be seen that there is nothing in the ordinance complained of which is violative of the Fourteenth Amendment or the Japanese treaty.

Viewing the ordinance as though it were a statute enacted by the State of Washington by virtue of its police power, the plaintiff in error has not met the burden of overcoming the presumption as to its validity. The occupation involved has been properly classified by the courts as a privilege, and this fact justifies the legislative authority in limiting its exercise to citizens of the United States. There is nothing in the Fourteenth Amendment which forbids this.

Regardless of whether the Federal Government can impair a state's police power by means of a treaty, no reasonable construction of the treaty here invoked would warrant the holding that the privilege of pawnbroking was intended to be included in its scope.

We submit that there is no error in the judgment rendered herein by the supreme court of the State of Washington and that it should be affirmed.

Respectfully submitted,

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4. DECISION OF THE COURT.

(May 26, 1924.)

Mr. Justice Butler delivered the opinion of the court.

Plaintiff in error is a subject of the Emperor of Japan, and since 1904 has resided in Seattle, Washington. Since July, 1915, he has been engaged in business there as a pawnbroker. The city passed an ordinance, which took effect July 2, 1921, regulating the business of pawnbroker and repealing former ordinances on the same subject. It makes it unlawful for any person to engage in the business unless he shall have a license, and the ordinance provided "that no such license shall be granted unless the applicant be a citizen of the United States." Violations of the ordinance are punishable by fine or imprisonment or both. Plaintiff in error brought this suit in the superior court of King County, Washington, against the city, its comptroller and chief of police to restrain them from enforcing the ordinance against him. He attacked the ordinance on the ground that it violates the treaty between the United States and the Empire of Japan, proclaimed April 5, 1911, 37 Stat. 1504; violates the constitution of the State of Washington, and also the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. He declared his

willingness to comply with any valid ordinance relating to the business of pawnbroker. It was shown that he had about \$5,000 invested in his business, which would be broken up and destroyed by the enforcement of the ordinance. The superior court granted the relief prayed. On appeal, the supreme court of the state held the ordinance valid and reversed the decree. The case is here on writ of error under section 237 of the Judicial Code.

Does the ordinance violate the treaty? Plaintiff in error invokes and relies upon the following provisions: "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established. * * * The citizens or subjects of each * * * shall receive, in the territories of the other, the most consistent protection and security of their persons and property. * * *

A treaty made under the authority of the United States "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (Constitution, art. VI, sec. 2.)

The treaty-making power of the United States is not limited by any express provisions of the Constitution, and, though it does not extend "so far as to authorize what the Constitution forbids," it does extend to all proper subjects of negotiation between our Government and other nations. (*Geofroy vs. Riggs*, 133 U. S. 258, 266, 267; *In re Ross*, 140 U. S. 453, 463; *Missouri vs. Holland*, 252 U. S. 416.) The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. Treaties for the protection of citizens of one country residing in the territory of another are numerous, and make for good understanding between nations. The treaty is binding within the State of Washington. (*Baldwin vs. Franks*, 120 U. S. 678, 682-683.) The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. (*Foster vs. Nielson*, 2 Pet. 253, 314; *Head Money Cases*, 112 U. S. 580, 598; *Chew Heony vs. United States*, 112 U. S. 536, 540; *Whitney vs. Robertson*, 124 U. S. 190, 194; *Maiorano vs. Baltimore & Ohio R. R. Co.*, 213 U. S. 268, 272.)

The purpose of the ordinance complained of is to regulate, not to prohibit, the business of pawnbroker. But it makes it impossible for aliens to carry on the business. It need not be considered whether the state, if it sees fit, may forbid and destroy the business generally. Such a law would apply equally to aliens and citizens, and no question of conflict with the treaty would arise. The grievance here alleged is that plaintiff in error, in violation of the treaty, is denied equal opportunity.

It remains to be considered whether the business of pawnbroker is "trade" within the meaning of the treaty. Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. (*Hauenstein vs. Lynham*, 100 U. S.

483; *Geofroy vs. Riggs*, *supra*, 271; *Tucker vs. Alexandroff*, 183 U. S. 424, 437.) The ordinance defines "pawnbroker" to mean and include every person whose business or occupation it is to take and receive by way of pledge, pawn or exchange, goods, wares or merchandise, or any kind of personal property whatever, for the repayment or security of any money loaned thereon, or to loan money on deposit of personal property"; and defines "pawnshop" to "mean and include every place at which business of pawnbroker is carried on". The language of the treaty is comprehensive. The phrase "to carry on trade" is broad. That it is not to be given a restricted meaning is plain. The clauses "to * * * own or lease * * * shops, * * * to lease land * * * for * * * commercial purposes, and generally to do anything incident to or necessary for trade", and "shall receive * * * the most constant protection and security of their * * * property * * *," all go to show the intention of the parties that the citizens or subjects of either shall have liberty in the territory of the other to engage in all kinds and classes of business that are or reasonably may be embraced within the meaning of the word "trade" as used in the treaty.

By definition contained in the ordinance, pawnbrokers are regarded as carrying on a "business". A feature of it is the lending of money upon the pledge or pawn of personal property which, in case of default, may be sold to pay the debt. While the amounts of the loans made in that business are relatively small and the character of property pledged as security is different, the transactions are similar to loans made by banks on collateral security. The business of lending money on portable securities has been carried on for centuries. In most of the countries of Europe, the pledge system is carried on by governmental agencies; in some of them the business is also carried on by private parties. In England, as in the United States, the private pledge system prevails. In this country the practice of pledging personal property for loans dates back to early colonial times, and pawnshops have been regulated by state laws for more than a century. We have found no state legislation abolishing or forbidding the business. Most, if not all, of the states provide for licensing pawnbrokers and authorize regulation by municipalities. While regulation has been found necessary in the public interest the business is not on that account to be excluded from the trade and commerce referred to in the treaty. Many worthy occupations and lines of legitimate business are regulated by state and federal laws for the protection of the public against fraudulent and dishonest practices. There is nothing in the character of the business of pawnbroker which requires it to be excluded from the field covered by the above-quoted provision, and it must be held that such business is "trade" within the meaning of the treaty. The ordinance violates the treaty. We need not consider other grounds upon which it is attacked.

Decree reversed.

A true copy.

PART III
APPENDIX

CHAPTER I.

THE CONSTITUTION OF THE UNITED STATES.

PREAMBLE.

Objects for which the Constitution was established.

ARTICLE I.

The Legislative Power.

- Section 1. The Congress of the United States.
- Section 2. The House of Representatives.
- Section 3. The Senate.
- Section 4. Election of Senators and Representatives—Meetings of Congress.
- Section 5. Powers and duties of each House—Journals—Adjournments.
- Section 6. Compensation of Senators and Representatives—Privilege from arrest—Freedom of speech and debate—Holding other offices.
- Section 7. Process of legislation—President's veto power.
- Section 8. Enumerated powers of Congress.
- Section 9. Prohibitions and limitations on powers of Congress.
- Section 10. Restrictions on powers of the states.

ARTICLE II.

The Executive Power.

- Section 1. The President—Term of office—Election—Qualifications—Succession of Vice-President—Compensation—Oath of office.
- Section 2. Enumerated powers and duties of President.
- Section 3. Relations of President with Congress—Diplomatic business—Execution of the laws.
- Section 4. Impeachment of President and other officers.

ARTICLE III.

The Judicial Power.

- Section 1. Supreme Court of the United States and other federal courts—Tenure of judges—Compensation.
- Section 2. Jurisdiction of United States courts—Original and appellate jurisdiction of Supreme Court—Trial by jury—Place of trial.
- Section 3. Treason against the United States—Definition and punishment.

ARTICLE IV.

Interstate Relations.

- Section 1. Full faith and credit to public acts, records and proceedings.
- Section 2. Interstate privileges and immunities of citizenship—Extradition—Fugitive slaves.
- Section 3. Admission and formation of new states—Public lands.
- Section 4. Guaranty of republican government—Protection of states against invasion and domestic violence.

ARTICLE V.

Amendment of the Constitution.

Proposal of amendments by Congress—Convention for proposing amendments—Ratification of amendments.

ARTICLE VI.

Miscellaneous Provisions.

Validity of the public debt—The Constitution the supreme law of the land—Oath of public officers to support the Constitution—No religious test required.

ARTICLE VII.

Ratification and Establishment of the Constitution.

AMENDMENTS.

- I. Religious freedom—Freedom of speech and press—Right of assembly and petition.
- II. The militia—Right to keep and bear arms.
- III. Quartering of soldiers.
- IV. Security against unreasonable searches and seizures—Search warrants.
- V. Right to indictment by grand jury—Twice in jeopardy—Privilege against self-crimination—Protection of life, liberty, and property by due process of law—Taking private property for public use.
- VI. Rights of accused in criminal trials.
- VII. Trial by jury in civil cases.
- VIII. Prohibition of excessive bail or fines, and cruel and unusual punishments.
- IX. Reservation of rights of the people.
- X. Powers not delegated are reserved to the states or the people.
- XI. Exemption of states from suits by citizens.
- XII. Manner of electing President and Vice-President.
- XIII. Abolition of slavery and involuntary servitude.
- XIV. Definition of United States citizenship—Privileges and immunities of citizens not to be abridged by states—Guaranty of due process of law—Equal protection of the laws—Apportionment of Representatives in Congress—Disqualification for office by insurrection or rebellion—Removal of disabilities—Validity of the public debt.
- XV. Right of suffrage not to be denied on account of race, color, or previous servitude.
- XVI. Levy of income tax without apportionment.
- XVII. Popular election of Senators.
- XVIII. National prohibition.
- XIX. Woman suffrage.

THE CONSTITUTION OF THE UNITED STATES.

PREAMBLE.

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.—THE LEGISLATIVE POWER.

Section 1.—The Congress of the United States.

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2.—The House of Representatives.

1. The House of Representatives shall be composed of members chosen

every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose 3; Massachusetts, 8; Rhode Island and Providence Plantations, 1; Connecticut, 5; New York, 6; New Jersey, 4; Pennsylvania, 8; Delaware, 1; Maryland, 6; Virginia, 10; North Carolina, 5; South Carolina, 5; and Georgia, 3.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers, and shall have the sole power of impeachment.

Section 3.—The Senate.

1. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments, until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *Pro Tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law.

Section 4.—Election of Senators and Representatives—Meetings of Congress.

1. The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to places of choosing Senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5.—Powers and Duties of Each House—Journals—Adjournments.

1. Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized, to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member.

3. Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which two Houses shall be sitting.

Section 6.—Compensation of Senators and Representatives—Privilege from Arrest—Freedom of Speech and Debate—Holding Other Offices.

1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any speech or debate in either House, they shall not be questioned in any other place.

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office.

Section 7.—Process of Legislation—President's Veto Power.

1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate shall, before it becomes a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall

return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8.—Enumerated Powers of Congress.

1. The Congress shall have power: To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

2. To borrow money on the credit of the United States.

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States.

7. To establish post-offices and post-roads.

8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

9. To constitute tribunals inferior to the Supreme Court.

10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years.

13. To provide and maintain a navy.

14. To make rules for the government and regulation of the land and naval forces.

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the

officers, and the authority of training the militia according to the discipline prescribed by Congress.

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Section 9.—Prohibitions and Limitations of Powers of Congress.

1. The migration or importation of such persons as any of the states now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or *ex post facto* law shall be passed.

4. No capitalization or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any state.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Section 10.—Restrictions on Powers of the State.

1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war,

unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.—THE EXECUTIVE POWER.

Section 1.—The President—Term of Office—Election—Qualifications—Succession of Vice-President—Compensation—Oath of Office.

1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives, to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit, under the United States shall be appointed an elector.

3. The electors shall meet in their respective states, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each, which list they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed, and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum, for this purpose, shall consist of a member or members from two-thirds of the states and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.

4. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

5. No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

7. The President shall, at stated times, receive for his services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive

within that period any other emolument from the United States, or any of them.

8. Before he enters on the execution of his office he shall take the following oath or affirmation:

"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2.—Enumerated Powers and Duties of President.

1. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commission, which shall expire at the end of their next session.

Section 3.—Relations of President with Congress—Diplomatic Business—Execution of the Laws.

He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4.—Impeachment of President and Other Officers.

The President, Vice-President, and all the civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.—THE JUDICIAL POWER.

Section 1.—Supreme Court of the United States and Other Federal Courts—Tenure of Judges—Compensation.

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services compensation which shall not be diminished during their continuance in office.

Section 2.—Jurisdiction of United States Courts—Original and Appellate Jurisdiction of Supreme Court—Trial by Jury—Place of Trial.

1. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers, and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed.

Section 3.—Treason against the United States—Definition and Punishment.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attained.

ARTICLE IV.—INTERSTATE RELATIONS.

Section 1.—Full Faith and Credit to Public Acts, Records, and Proceedings.

Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section 2.—Interstate Privileges and Immunities of Citizenship—Extradition—Fugitive Slaves.

1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3.—Admission and Formation of New States—Public Lands.

1. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states,

or parts of states, without the consent of the legislatures of the states concerned, as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section 4.—Guaranty of Republican Government—Protection of States against Invasion and Domestic Violence.

The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

ARTICLE V.—AMENDMENTS OF THE CONSTITUTION.

Proposal of Amendments by Congress—Convention for Proposing Amendments—Ratification of Amendments.

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments of this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

ARTICLE VI.—MISCELLANEOUS PROVISIONS.

Validity of the Public Debt—The Constitution the Supreme Law of the Land—Oath of Public Officers to Support the Constitution—No Religious Test Required.

1. All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

2. This Constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

3. The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.—RATIFICATION AND ESTABLISHMENT OF THE CONSTITUTION.

The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

AMENDMENTS.

Article I.

Religious Freedom—Freedom of Speech and Press—Right of Assembly and Petition.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article II.

The Militia—Right to Keep and Bear Arms.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III.

Quartering of Soldiers.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV.

Security against Unreasonable Searches and Seizures—Search Warrants.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V.

Legal Privileges.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI.

Rights of Accused in Criminal Trials.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

Article VII.

Trial by Jury in Civil Cases.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Article VIII.

Prohibition of Excessive Bail or Fines, and Cruel and Unusual Punishments.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX.

Reservation of Rights of the People.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X.

Powers not Delegated Are Reserved to the State or the People.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Article XI.

Exemption of States from Suits by Citizens.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Article XII.

Manner of Electing President and Vice-President.

The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the state, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be

necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

* Article XIII.

Abolition of Slavery and Involuntary Servitude.

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any places subject to their jurisdiction.

Sec. 2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV.

Citizenship.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Sec. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Sec. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article XV.

Right of Suffrage Not To Be Denied on Account of Race, Color, or Previous Servitude.

Section 1. The right of the citizens of the United States to vote shall not

be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

Article XVI.

Levy of Income Tax Without Apportionment.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.

Article XVII.

Popular Election of Senators.

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as a part of the Constitution.

Article XVIII.

National Prohibition.

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several states, as provided in the Constitution, within seven years from the date of the submission hereof to the states by the Congress.

Article XIX.

Woman Suffrage.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex.

Sec. 2. Congress shall have power, by appropriate legislation, to enforce the provisions of this article.

CHAPTER II.

NATURALIZATION LAWS OF THE UNITED STATES.

Act of June 29, 1906 (34 Stat. L., part 1, p. 596), as amended in sections 16, 17, and 19 by the Act of Congress approved March 4, 1909¹ (35 Stat. L., part 1, p. 1102); section 13 by the Act of Congress approved June 25, 1910² (36 Stat. L., part 1, p. 830); by the Act of Congress approved March 4, 1913³ (37 Stat. L., part 1, p. 736), creating the Department of Labor; and by the Act of Congress approved May 9, 1918⁴ (40 Stat. L., part 1, p. 542).

An Act to provide for a uniform rule for the naturalization of aliens throughout the United States, and establishing the Bureau of Naturalization.

(Portion of act creating the Department of Labor.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby created an executive department in the Government to be called the Department of Labor, with a Secretary of Labor, who shall be the head thereof, to be appointed by the President, by and with the advice and consent of the Senate; * * *

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Sec. 3. That the following-named officers, bureaus, divisions, and branches of the public service now and heretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertains to the same, known as * * * the Bureau of Immigration and Naturalization, * * * the Division of Naturalization, * * * be, and the same hereby are, transferred from the Department of Commerce and Labor to the Department of Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named department. The Bureau of Immigration and Naturalization is hereby divided into two bureaus, to be known hereafter as the Bureau of Immigration and the Bureau of Naturalization, and the titles chief division of naturalization and assistant chief shall be commissioner of naturalization and deputy commissioner of naturalization. The commissioner of naturalization or, in his absence, the deputy commissioner of naturalization, shall be the administrative officer in charge of the Bureau of Naturalization and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor, to whom he shall report directly upon all naturalization matters annually and as otherwise required, * * *.

(Act of June 29, 1906, as amended by the acts heretofore referred to.)

That the Bureau of Naturalization, under the direction and control of the Secretary of Labor, shall have charge of all matters concerning the naturalization of aliens. That it shall be the duty of the Bureau of Immigration to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, com-

¹See Naturalization Laws and Regulations, June 15, 1924, pp. 26, 28.

²See p. 370, post. ³See p. 361, above. ⁴See p. 364, post.

plexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof.

Sec. 2. (This section is omitted, as it authorized the Secretary of Commerce and Labor to provide the necessary offices in the City of Washington and take the necessary steps for the proper discharge of the duties imposed by the Act of June 29, 1906.)

Sec. 3. That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit¹ and district courts now existing, or which may hereafter be established by Congress in any state, United States district courts for the Territories of Arizona,² New Mexico,² Oklahoma,² Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory²; also all courts of record in any state or territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

That the naturalization jurisdiction of all courts herein specified—state, territorial, and federal—shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of Naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said bureau.

Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration³.

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation,

¹ United States circuit courts abolished December 31, 1911, by Act of Congress approved March 3, 1911 (36 Stat. L., part 1, p. 1167).

² United States territorial courts abolished by acts of Congress conferring statehood.

³ See *U. S. vs. Morena*, 245 U. S. 392.

and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or the District of Columbia,¹ in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act, stating the date, place, and manner of his arrival in the United States,² and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

¹ The word "District" amended by the Act of May 9, 1918, to read "the District of Columbia."

² See *U. S. vs. Ness*, 245 U. S. 319, holding that the filing of a certificate of arrival as provided in section 4 of the Act of June 29, 1906, is an essential prerequisite to a valid order of naturalization.

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention.

¹Seventh. Any native-born Filipino of the age of twenty-one years and upward who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy or Marine Corps or the Naval Auxiliary Service, and who, after service of not less than three years, may be honorably discharged therefrom, or who may receive an ordinary discharge with recommendation for re-enlistment; or any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upward, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, either the Regular or the Volunteer Forces, or the National Army, the National Guard or Naval Militia of any state, territory, or the District of Columbia, or the state militia in federal service, or in the United States Navy or Marine Corps, or in the United States Coast Guard, or who has served for three years on board of any vessel of the United States Government, or for three years on board of merchant or fishing vessels of the United States of more than twenty tons burden, and while still in the service on a re-enlistment or reappointment, or within six months after an honorable discharge or separation therefrom, or while on furlough to the Army Reserve or Regular Army Reserve after honorable service, may, on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision, it is shown that such residence can not be established; any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States; any alien declarant who has served in the

¹Section four of the act entitled "An act to establish a Bureau of Immigration and Naturalization and to provide a uniform rule for the naturalization of aliens throughout the United States," approved June twenty-ninth, nineteen hundred and six, was amended by the Act of May 9, 1918 (40 Stat. L., part 1, p. 542), by adding seven new subdivisions.

United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition, by two witnesses, citizens of the United States, and in these cases only residence in the Philippine Islands and the Panama Canal Zone by aliens may be considered residence within the United States, and the place of such military service shall be construed as the place of residence required to be established for purposes of naturalization; and any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding the limitation upon the jurisdiction of the courts specified in section three of the Act of June twenty-ninth, nineteen hundred and six, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed *prima facie* evidence to satisfy all of the requirements of residence within the United States and within the state, territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed; and any petition for naturalization filed under the provisions of this subdivision may be heard immediately, notwithstanding the law prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court. Any alien, who, at the time of the passage of this act, is in the military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court. The petition shall be verified by the affidavits of at least two credible witnesses who are citizens of the United States, and who shall prove in their affidavits the portion of the residence that they have personally known the applicant to have resided within the United States. The time of military service may be established by the affidavits of at least two other citizens of the United States, which, together with the oath of allegiance, may be taken in accordance with the terms of section seventeen hundred and fifty of the Revised Statutes of the United States after notice from and under regulations of the Bureau of Naturalization. Such affidavits and oath of allegiance shall be admitted in evidence in any original or appellate naturalization proceeding without proof of the genuineness of the seal or signature or of the official character of the officer before whom the affidavits and oath of allegiance were taken, and shall be filed by the representative of the Government from the Bureau of Natural-

ization at the hearing as provided by section eleven of the Act of June twenty-ninth, nineteen hundred and six. Members of the Naturalization Bureau and Service may be designated by the Secretary of Labor to administer oaths relating to the administration of the naturalization law; and the requirement of section ten of notice to take depositions to the United States attorneys is repealed, and the duty they perform under section fifteen of the Act of June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, part one, page five hundred and ninety-six), may also be performed by the commissioner or deputy commissioner of naturalization: Provided, that it shall not be lawful to make a declaration of intention before the clerk of any court on election day or during the period of thirty days preceding the day of holding any election in the jurisdiction of the court: Provided further, that service by aliens upon vessels other than of American registry, whether continuous or broken, shall not be considered as residence for naturalization purposes within the jurisdiction of the United States, and such aliens can not secure residence for naturalization purposes during service upon vessels of foreign registry.

During the time when the United States is at war no clerk of a United States court shall charge or collect a naturalization fee from an alien in the military service of the United States for filing his petition or issuing the certificate of naturalization upon admission to citizenship, and no clerk of any state court shall charge or collect any fee for this service unless the laws of the state require such charge to be made, in which case nothing more than the portion of the fee required to be paid to the state shall be charged or collected. A full accounting for all of these transactions shall be made to the Bureau of Naturalization in the manner provided by section thirteen of the Act of June twenty-ninth, nineteen hundred and six.

Eighth. That every seaman, being an alien, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served three years upon such merchant or fishing vessels of the United States, be deemed a citizen of the United States for the purpose of serving on board any such merchant or fishing vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such after the filing of his declaration of intention to become such citizen: Provided, that nothing contained in this act shall be taken or construed to repeal or modify any portion of the Act approved March fourth, nineteen hundred and fifteen (Thirty-eighth Statutes at Large, part one, page eleven hundred and sixty-four, chapter one hundred and fifty-three), being an act to promote the welfare of American seamen.

Ninth. That for the purpose of carrying on the work of the Bureau of Naturalization of sending the names of the candidates for citizenship to the public schools and otherwise promoting instruction and training in citizenship responsibilities of applicants for naturalization, as provided in this subdivision, authority is hereby given for the reimbursement of the printing and binding appropriation of the Department of Labor upon the records of the Treasury Department from the naturalization fees deposited in the Treasury through the Bureau of Naturalization for the cost of publishing the citizenship textbook prepared and to be distributed by the Bureau of Naturalization to those candidates for citizenship only who are in attendance upon the public schools, such reimbursement to be made upon statements by the commissioner of naturalization of books actually delivered to such student candidates for citizenship, and a monthly naturalization bulletin, and in this duty to secure the aid of and co-operate with the official state and national organizations, including those concerned with vocational

education and including personal services in the District of Columbia, and to aid the local Army exemption boards and co-operate with the War Department in locating declarants subject to the Army draft and expenses incidental thereto.

Tenth. That any person not an alien enemy, who resided uninterruptedly within the United States during the period of five years next preceding July first, nineteen hundred and fourteen, and was on that date otherwise qualified to become a citizen of the United States, except that he had not made the declaration of intention required by law, and who during or prior to that time, because of misinformation regarding his citizenship status erroneously exercised the rights and performed the duties of a citizen of the United States in good faith, may file the petition for naturalization prescribed by law without making the preliminary declaration of intention required of other aliens, and upon satisfactory proof to the court that he has so acted may be admitted as a citizen of the United States upon complying in all respects with the other requirements of the naturalization law.

Eleventh. No alien who is a native, citizen, subject, or denizen of any country, state, or sovereignty with which the United States is at war shall be admitted to become a citizen of the United States unless he made his declaration of intention not less than two nor more than seven years prior to the existence of the state of war, or was at that time entitled to become a citizen of the United States, without making a declaration of intention, or unless his petition for naturalization shall then be pending and is otherwise entitled to admission, notwithstanding he shall be an alien enemy at the time and in the manner prescribed by the laws passed upon that subject: Provided, that no alien embraced within this subdivision shall have his petition for naturalization called for a hearing, or heard, except after ninety days' notice given by the clerk of the court to the commissioner or deputy commissioner of naturalization to be present, and the petition shall be given no final hearing except in open court and after such notice to the representative of the Government from the Bureau of Naturalization, whose objection shall cause the petition to be continued from time to time for so long as the Government may require: Provided, however, that nothing herein contained shall be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien; and section twenty-one hundred and seventy-one of the Revised Statutes of the United States is hereby repealed: Provided further, That the President of the United States may, in his discretion, upon investigation and report by the Department of Justice fully establishing the loyalty of any alien enemy not included in the foregoing exemption, except such alien enemy from the classification of alien enemy, and thereupon he shall have the privilege of applying for naturalization; and for the purpose of carrying into effect the provisions of this section, including personal services in the District of Columbia, the sum of \$400,000 is hereby appropriated, to be available until June thirtieth, nineteen hundred and nineteen, including travel expenses for members of the Bureau of Naturalization and its field service only, and the provisions of section thirty-six hundred and seventy-nine of the Revised Statutes shall not be applicable in any way to this appropriation.

Twelfth. That any person who, while a citizen of the United States and during the existing war in Europe, entered the military or naval service of any country at war with a country with which the United States is now at war, who shall be deemed to have lost his citizenship by reason of any

oath or obligation taken by him for the purpose of entering such service, may resume his citizenship by taking the oath of allegiance to the United States prescribed by the naturalization law and regulations, and such oath may be taken before any court of the United States or of any state authorized by law to naturalize aliens or before any consul of the United States, and certified copies thereof shall be sent by such court or consul to the Department of State and the Bureau of Naturalization, and the act (Public fifty-five, Sixty-fifth Congress, approved October fifth, nineteen hundred and seventeen), is hereby repealed.

Thirteenth. That any person who is serving in the military or naval forces of the United States at the termination of the existing war, and any person who before the termination of the existing war may have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, shall, if he applies to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he has resided continuously within the United States the time required by law of other aliens, or within the state, territory, or the District of Columbia for the year immediately preceding the date of his petition for naturalization, but his petition for naturalization shall be supported by the affidavits of two credible witnesses, citizens of the United States, identifying the petitioner as the person named in the certificate of honorable discharge, which said certificate may be accepted as evidence of good moral character required by law, and he shall comply with the other requirements of the naturalization law.

Sec. 5. That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned.

Sec. 6. That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: Provided, that no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith.

Sec. 7. That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or

their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States.

Sec. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: Provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, that the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.

Sec. 9. That every final hearing upon such petition shall be had in open court¹ before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court, and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court.

Sec. 10. That in case the petitioner has not resided in the state, territory, or the District of Columbia² for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the state, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Naturalization.

Sec. 11. That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings.

Sec. 12. That it is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this act to keep and file a duplicate of each declaration of intention made before him and to send to the Bureau of Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all the essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said

¹ See *U. S. vs. Solomon Louis Ginsberg*, 243 U. S. 472, April 9, 1917, holding that under section 9 of the Act of June 29, 1906, a hearing in the judge's chambers adjoining the court room is not a compliance with the section.

² The word "District" amended by the Act of May 9, 1918, to read "the District of Columbia."

court affecting or relating to the naturalization of aliens as may be required from time to time by the said bureau.

In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the Bureau of Naturalization, and shall account for the same to the said bureau whenever required so to do by such bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned.

Sec. 13.¹ That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

For making filing and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Naturalization, and paid over to such bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the Auditor for the State and Other Departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received.

In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom he may request a subpoena, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose and the residue, if any, shall be returned by the clerk to the petitioner: Provided, that the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said bureau

¹ Sec. 13 as amended by Act of June 25, 1910.

as in case of other fees to which the United States may be entitled under the provisions of this act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this act upon the clerks of courts from fees received by such clerks in naturalization proceedings.

And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year, the Secretary of Labor may allow salaries, for naturalization purposes only, to pay for clerical assistance, to be selected and employed by that clerk, additional to the clerical force, for which clerks of courts are required by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said Secretary, the naturalization business of such clerk warrants further additional assistance: Provided, that in no event shall the whole amount allowed the clerk of a court and his assistants exceed the one-half of the gross receipts of the office of said clerk from naturalization fees during such fiscal year: Provided further, that when, at the close of any fiscal year, the business of such clerk of court indicates, in the opinion of the Secretary of Labor, that the naturalization fees for the succeeding fiscal year will exceed six thousand dollars, the Secretary of Labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for, and employed on the last day of the fiscal year until such time as the remittances indicate, in the opinion of said Secretary, that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this act.

That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the Secretary of Labor may prescribe.

Sec. 14. That the declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition whereon such certificate was issued, and the volume number and page number of the stub of such certificate.

Sec. 15.¹ That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days' personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon

¹ See *Johannessen vs. U. S.*, 225 U. S., canceling a certificate issued through fraud prior to the passage of the act; also *Luria vs. U. S.*, 231 U. S. 9, canceling a certificate issued in July, 1894, where the applicant one month after his naturalization left the United States and proceeded to South Africa; and *U. S. vs. Ness*, 245 U. S. 319, holding that where a certificate of arrival had not been obtained and filed as required by law the certificate of naturalization was illegally procured within the meaning of section 15 of the Act of June 29, 1906.

absentees by the laws of the state or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered *prima facie* evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws.

Sec. 16. (Superseded by Act of March 4, 1909. See sec. 74.)

Sec. 17. (Superseded by Act of March 4, 1909. See sec. 75.)

Sec. 18. That it is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this act, except upon a final order under the hands of a court having jurisdiction to make such order, and upon conviction thereof such clerk or other person shall be punished by imprisonment for not more than five years and by a fine of not more than five thousand dollars, in the discretion of the court.

Sec. 19. (Superseded by Act of March 4, 1909. See sec. 77.)

Sec. 20. That any clerk or other officer of a court having power under this act to naturalize aliens, who willfully neglects to render true accounts of moneys received by him for naturalization proceedings or who willfully neglects to pay over any balance of such moneys due to the United States within thirty days after said payment shall become due and demand therefor has been made and refused, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprisonment for not more than five years, or by a fine of not more than five thousand dollars, or both.

Sec. 21. That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein

specified; and a violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor and shall be punished by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

Sec. 22. That the clerk of any court exercising jurisdiction in naturalization proceedings, or any person acting under authority of this act, who shall knowingly certify that a petitioner, affiant, or witness named in an affidavit, petition, or certificate of citizenship, or other paper or writing required to be executed under the provisions of this act, personally appeared before him and was sworn thereto, or acknowledged the execution thereof or signed the same, when in fact such petitioner, affiant, or witness did not personally appear before him, or was not sworn thereto, or did not execute the same, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not to exceed five years.

Sec. 23. That any person who knowingly procures naturalization in violation of the provisions of this act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises, or encourages any person not entitled thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both.

Sec. 24. That no person shall be prosecuted, tried, or punished for any crime arising under the provisions of this act unless the indictment is found or the information is filed within five years next after the commission of such crime.

Sec. 25. That for the purpose of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to the date when this act shall go into effect, the existing naturalization laws shall remain in full force and effect.

Sec. 26. That section twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed.

Sec. 27. That substantially the following forms shall be used in the proceedings to which they relate: (Forms omitted.)

Sec. 28. That the Secretary of Labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this act shall be admitted in evidence equally with the originals in any and all proceedings under this act and in all cases in which the originals thereof might be admissible as evidence.

Sec. 29. That for the purpose of carrying into effect the provisions of this

act there is hereby appropriated the sum of one hundred thousand dollars, out of any moneys in the Treasury of the United States not otherwise appropriated, which appropriation shall be in full for the objects hereby expressed until June thirtieth, nineteen hundred and seven; and the provisions of section thirty-six hundred and seventy-nine of the Revised Statutes of the United States shall not be applicable in any way to this appropriation.

Sec. 30. That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any state or organized territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law.

Sec. 31. That this act shall take effect and be in force from and after ninety days from the date of its passage: Provided, that sections one, two, twenty-eight, and twenty-nine shall go into effect from and after the passage of this act.

Approved June 29, 1906.

NATURALIZATION.

(For a list of sections repealed see p. 17, Naturalization Laws and Regulations, June 15, 1924; sec. 26 of Act of June 29, 1906; subdivisions 11th and 12th, under sec. 4, p. 10; and p. 28.)

Naturalization Limited to White Persons and Those of the African Race.

(Act of February 18, 1875, amending Act of July 14, 1870.)

Sec. 2169.¹ The provisions of this title shall apply to aliens being free white persons; and to aliens of African nativity and to persons of African descent. (R. S. 1878, p. 380; 1 Comp. Stat. 1901, p. 1233.)

Naturalization of Chinese Prohibited.

(Act of May 6, 1882.)

Sec. 14. That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed. (22 Stat. L., p. 61.)

Residence Within the United States Required for Five Years Continuously.

(Act of March 3, 1813.)

(The United States Circuit Court of Appeals has held that sec. 2170 was not repealed by the Naturalization Act of June 29, 1906. [See *United States vs. Rodicek*, 162 Fed. 469.])

Sec. 2170. No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States. (R. S. 1878, p. 380; 1 Comp. Stat. 1901, p. 1333.)

Naturalization of Declarants Who Have Served in the Naval Reserve Force in Time of War.

(Act of May 22, 1917.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act

¹See *Takao Ozawa vs. U. S.*, 260 U. S. 178; *Takuji Yamashita vs. Hinkle, Secretary of State*, 260 U. S. 199; *U. S. vs. Bhagat Singh Thind*, 261 U. S. 204.

making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, be, and the same is hereby, amended by adding after the proviso under the heading "Naval Reserve Force," which reads as follows: "Provided, That citizens of the insular possessions of the United States may enroll in the Naval Auxiliary Reserve," a further proviso as follows: Provided further, That such persons who are not citizens of the United States, but who have or shall have declared their intention to become citizens of the United States, and who are citizens of countries which are at peace with the United States, may enroll in the Naval Reserve Force subject to the condition that they may be discharged from such enrollment at any time within the discretion of the Secretary of the Navy, and such persons who may, under existing law, become citizens of the United States, and who render honorable service in the Naval Reserve Force in time of war for a period of not less than one year may become citizens of the United States without proof of residence on shore and without further requirement than proof of good moral character and certificate from the Secretary of the Navy that such honorable service was actually rendered. (40 Stat. L., pt. 1, p. 84.)

Honorably Discharged Soldiers Exempt from Certain Formalities.

(Act of July 17, 1862.)

Sec. 2166. R. S. 1878, p. 379; 1 Comp. Stat. 1901, p. 1332. This section repealed by Act of May 9, 1918 (40 Stat. L., pt. 1, p. 542), except as to honorably discharged soldier who served in U. S. Armies prior to January 1, 1900. (See subdivision 7th, p. 6; sec. 2, p. 28.)

Aliens Honorably Discharged from Service in Navy or Marine Corps.

(Act of July 26, 1894 [28 Stat. L., p. 124]. Repealed by Act of May 9, 1915 [40 Stat. L., pt. 1, sec. 2, p. 546].)

(See subdivision 7th, p. 364.)

Aliens Honorably Discharged from Service in Navy, Marine Corps, Revenue-Cutter Service, or Naval Auxiliary Service.

(Act of June 30, 1914 [38 Stat. L., pt. 1, p. 395]. Repealed by Act of May 9, 1918 [40 Stat. L., pt. 1, sec. 2, p. 546].)

(See subdivision 7th, p. 364.)

Aliens Honorably Discharged from Military or Naval Forces of the United States after Service during the Present War.

(Act of July 19, 1919.)

* * * * *

Any person of foreign birth who served in the military or naval forces of the United States during the present war, after final examination and acceptance by the said military or naval authorities, and shall have been honorably discharged after such acceptance and service, shall have the benefits of the seventh subdivision of section 4, of the Act of June 29, 1906, 34 Statutes at Large, part 1, page 596, as amended, and shall not be required to pay any fee therefor; and this provision shall continue for the period of one year after all of the American troops are returned to the United States. (41 Stat. L., pt. 1, 222.)

Note.—The official date for the return of all American troops was March 3, 1923, therefore the exemptions carried by this act expired on March 3, 1924.

Aliens Who Erroneously Believed Themselves Citizens Exempt from Certain Formalities.

(Act of June 25, 1910.)

Sec. 3, 36 Stat. L., pt. 1, p. 830. This section repealed by Act of May 9, 1918 (40 Stat. L., pt. 1, sec. 2, p. 547). (See subdivision 10th, p. 9; also p. 28.)

Naturalization and Citizenship of Married Women.

(Act of September 22, 1922.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of any woman to become a naturalized citizen of the United States shall not be denied or abridged because of her sex or because she is a married woman.

Sec. 2. That any woman who marries a citizen of the United States after the passage of this act, or any woman whose husband is naturalized after the passage of this act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws, with the following exceptions:

(a) No declaration of intention shall be required;

(b) In lieu of the five-year period of residence within the United States and the one-year period of residence within the state or territory where the naturalization court is held, she shall have resided continuously in the United States, Hawaii, Alaska, or Porto Rico for at least one year immediately preceding the filing of the petition.

Sec. 3. That a woman citizen of the United States shall not cease to be a citizen of the United States by reason of her marriage after the passage of this act, unless she makes a formal renunciation of her citizenship before a court having jurisdiction over naturalization of aliens: Provided, That any woman citizen who marries an alien ineligible to citizenship shall cease to be a citizen of the United States. If at the termination of the marital status she is a citizen of the United States she shall retain her citizenship regardless of her residence. If during the continuance of the marital status she resides continuously for two years in a foreign state of which her husband is a citizen or subject, or for five years continuously outside the United States, she shall thereafter be subject to the same presumption as is a naturalized citizen of the United States under the second paragraph of section 2 of the act entitled "An act in reference to the expatriation of citizens and their protection abroad," approved March 2, 1907. Nothing herein shall be construed to repeal or amend the provisions of Revised Statutes 1999¹ or of section 2 of the Expatriation Act of 1907² with reference to expatriation.

NOT REPEALED.

¹*Revised Statutes 1999—Right of expatriation.*—Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. (R. S. 1999; Act July 27, 1868, c. 249, § 1, 15 Stat. 223.)

²*Section 2, Expatriation Act of 1907—Presumption of expatriation.*—Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign

Sec. 4. That a woman who, before the passage of this act, has lost her United States citizenship by reason of her marriage to an alien eligible for citizenship, may be naturalized as provided by section 2 of this act: Provided, That no certificate of arrival shall be required to be filed with her petition if during the continuance of the marital status she shall have resided within the United States. After her naturalization she shall have the same citizenship status as if her marriage had taken place after the passage of this act.

Sec. 5. That no woman whose husband is not eligible to citizenship shall be naturalized during the continuance of the marital status.

Sec. 6. That section 1994 of the Revised Statutes¹ and section 4 of the Expatriation Act of 1907² are repealed. Such repeal shall not terminate citizenship acquired or retained under either of such sections nor restore citizenship lost under section 4 of the Expatriation Act of 1907.

Sec. 7. That section 3 of the Expatriation Act of 1907³ is repealed. Such repeal shall not restore citizenship lost under such section nor terminate citizenship resumed under such section. A woman who has resumed under such section citizenship lost by marriage shall, upon the passage of this act, have for all purposes the same citizenship status as immediately preceding her marriage. (42 Stat. L., pt. 1, p. 1021.)

CITIZENSHIP.

(In regard to the acquisition of citizenship by means other than naturalization, see also secs. 1992 and 1995 of the United States Revised Statutes.)

Citizenship by Birth.

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. * * * (Constitution, Art. XIV.)

Citizenship of Children Born Abroad of Citizens.

(Act of February 10, 1855, amending Act of April 14, 1802.)

Sec. 1993. All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children

state. When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, that no American citizen shall be allowed to expatriate himself when this country is at war. (Act March 2, 1907, c. 2534, 2, 34 Stat. 1228.)

REPEALED.

¹Section 1994, Revised Statutes—*Citizenship of married women.*—Any woman who is now or may hereafter be married to a citizen of the United States and who might herself be lawfully naturalized shall be deemed a citizen. (R. S. 1994; Act Feb. 10, 1855, c. 71, 2, 10 Stat. 604.)

²Section 4, Expatriation Act of 1907.—That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation.

³Section 3, Expatriation Act of 1907.—That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

whose fathers never resided in the United States. (R. S. 1878, p. 350; 1 Comp. Stat. 1901, p. 1268.)

Citizenship of Women by Marriage.

(Act of February 10, 1855.)

Section 1994. R. S. 1878, p. 350; 1 Comp. Stat. 1901, p. 1268. This section repealed by the Act of September 22, 1922 (42 Stat. L., pt. 1, sec. 6, p. 1022.)

Children of Persons Naturalized under Certain Laws to be Citizens.

(Act of April 14, 1802.)

Sec. 2172. The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the legislature of the state in which such person was proscribed. (R. S. 1878, p. 380; 1 Comp. Stat. 1901, p. 1334.)

Expatriation of Citizens and Their Protection Abroad.

(Act of March 2, 1907.)

Sec. 1. (Repealed by 41 Stat. L., pt. 1, sec. 5, p. 751.)

Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided, also, that no American citizen shall be allowed to expatriate himself when this country is at war.

Sec. 3. (Repealed by 42 Stat. L., pt. 1, sec. 7, p. 1022. [See p. 24].)

Sec. 4. (Repealed by 42 Stat. L., pt. 1, sec. 6, p. 1022. [See p. 24].)

Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, that such naturalization or resumption takes place during the minority of such child: And provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

Sec. 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to

receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

Sec. 7. That duplicates of any evidence, registration, or other acts required by this act shall be filed with the Department of State for record. (34 Stat. L., pt. 1, p. 1228.)

NATURALIZATION RULES AND REGULATIONS.

(Effective May 15, 1924.)

RULE 4.—DECLARATION OF INTENTION.

Subdivision A.—Clerk may refuse to file.

Paragraph 1. Clerks of courts having naturalization jurisdiction shall not accept or file a declaration of intention made by an alien who is, or whose husband¹ is, of the (1) Chinese,² (2) Japanese,³ or (3) Hindu⁴ race.

Paragraph 2. Clerks of courts having naturalization jurisdiction shall not accept or file a declaration of intention to become a citizen of the United States when made by an alien who does not reside within the judicial district of such court.

Subdivision B.—How executed and disposed of—Numbering.

Paragraph 1. The declaration of intention, together with the duplicate and triplicate copies thereof, shall be executed by the alien before the clerk of the court exercising jurisdiction or his authorized deputy. The name of the declarant shall be written in full in his own handwriting without abbreviation, and where an initial is used to distinguish the declarant from another individual of the same surname, such fact shall be noted on the declaration: Provided, That where the alien has assumed a name other than his true name, both names shall be signed: And provided further, That where the declarant is unable to write, the declaration shall be signed by mark and properly witnessed by the clerk or his authorized deputy.

Paragraph 2. The original of such declaration shall be retained by such clerk, and the duplicate shall be forwarded to the proper district director of naturalization or head naturalization examiner on the first day of the month following the month in which the declaration is filed and the triplicate shall be forthwith delivered to the alien.

Paragraph 3. Declarations of intention shall be separately numbered in the order in which filed, beginning with number one and continuing such numbering in sequence *ad infinitum*.

¹ See Act of September 22, 1922, 42 Stat. L., pt. 1, p. 1021.

² See Act of May 6, 1882, 22 Stat. L., p. 61.

³ See *Takao Ozawa vs. U. S.*, 260 U. S. 178; also *Takuji Yamashita et al. vs. Hinkle, Secretary of State*, 260 U. S. 199.

⁴ See *U. S. vs. Bhagat Singh Thind*, 261 U. S. 204.

CHAPTER III.

IMMIGRATION ACT OF 1924.

(Public—No. 139—68th Congress.)

(H. R. 7995.)

An act to limit the immigration of aliens into the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this act may be cited as the "Immigration Act of 1924."

IMMIGRATION VISAS.

Sec. 2. (a) A consular officer upon the application of any immigrant (as defined in section 3) may (under the conditions hereinafter prescribed and subject to the limitations prescribed in this act or regulations made thereunder as to the number of immigration visas which may be issued by such officer) issue to such immigrant an immigration visa which shall consist of one copy of the application provided for in section 7, visaed by such consular officer. Such visa shall specify (1) the nationality of the immigrant; (2) whether he is a quota immigrant (as defined in section 5) or a non-quota immigrant (as defined in section 4); (3) the date on which the validity of the immigration shall expire; and (4) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws as may be by regulations prescribed.

(b) The immigrant shall furnish two copies of his photograph to the consular officer. One copy shall be permanently attached by the consular officer to the immigration visa and the other copy shall be disposed of as may be by regulations prescribed.

(c) The validity of an immigration visa shall expire at the end of such period, specified in the immigration visa, not exceeding four months, as shall be by regulations prescribed. In the case of an immigrant arriving in the United States by water, or arriving by water in foreign contiguous territory on a continuous voyage to the United States, if the vessel, before the expiration of the validity of his immigration visa, departed from the last port outside the United States and outside foreign contiguous territory at which the immigrant embarked, and if the immigrant proceeds on a continuous voyage to the United States, then, regardless of the time of his arrival in the United States, the validity of his immigration visa shall not be considered to have expired.

(d) If an immigrant is required by any law, or regulations or orders made pursuant to law, to secure the visa of his passport by a consular officer before being permitted to enter the United States, such immigrant shall not be required to secure any other visa of his passport than the immigration visa issued under this act, but a record of the number and date of his immigration visa shall be noted on his passport without charge therefor. This subdivision shall not apply to an immigrant who is relieved; under subdivision (b) of section 13, from obtaining an immigration visa.

(e) The manifest or list of passengers required by the immigration

laws shall contain a place for entering thereon the date, place of issuance, and number of the immigration visa of each immigrant. The immigrant shall surrender his immigration visa to the immigration officer at the port of inspection, who shall at the time of inspection indorse on the immigration visa the date, the port of entry and the name of the vessel, if any, on which the immigrant arrived. The immigration visa shall be transmitted forthwith by the immigration officer in charge at the port of inspection to the Department of Labor under regulations prescribed by the Secretary of Labor.

(f) No immigration visa shall be issued to an immigrant if it appears to the consular officer, from statements in the application, or in the papers submitted therewith, that the immigrant is inadmissible to the United States under the immigration laws, nor shall such immigration visa be issued if the application fails to comply with the provisions of this act, nor shall such immigration visa be issued if the consular officer knows or has reason to believe that the immigrant is inadmissible to the United States under the immigration laws.

(g) Nothing in this act shall be construed to entitle an immigrant, to whom an immigration visa has been issued, to enter the United States, if, upon arrival in the United States, he is found to be inadmissible to the United States under the immigration laws. The substance of this subdivision shall be printed conspicuously upon every immigration visa.

(h) A fee of \$9 shall be charged for the issuance of each immigration visa, which shall be covered into the Treasury as miscellaneous receipts.

DEFINITION OF "IMMIGRANT."

Sec. 3. When used in this act the term "immigrant" means any alien departing from any place outside the United States destined for the United States, except (1) a government official, his family, attendants, servants, and employees, (2) an alien visiting the United States temporarily as a tourist or temporarily for business or pleasure, (3) an alien in continuous transit through the United States, (4) an alien lawfully admitted to the United States who later goes in transit from one part of the United States to another through foreign contiguous territory, (5) a *bona fide* alien seaman serving as such on a vessel arriving at a port of the United States and seeking to enter temporarily the United States solely in the pursuit of his calling as a seaman, and (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.

NON-QUOTA IMMIGRANTS.

Sec. 4. When used in this act the term "non-quota immigrants" means—

(a) An immigrant who is the unmarried child under 18 years of age, or the wife, of a citizen of the United States who resides therein at the time of the filing of a petition under section 9;

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;

(c) An immigrant who was born in the Dominion of Canada, Newfoundland, the Republic of Mexico, the Republic of Cuba, the Republic of Haiti, the Dominican Republic, the Canal Zone, or an independent country of Central or South America, and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him;

(d) An immigrant who continuously for at least two years immediately preceding the time of his application for admission to the United States has been, and who seeks to enter the United States solely for the purpose

of, carrying on the vocation of minister of any religious denomination, or professor of a college, academy, seminary, or university; and his wife, and his unmarried children under 18 years of age, if accompanying or following to join him; or

(e) An immigrant who is a *bona fide* student at least 15 years of age and who seeks to enter the United States solely for the purpose of study at an accredited school, college, academy, seminary, or university, particularly designated by him and approved by the Secretary of Labor, which shall have agreed to report to the Secretary of Labor the termination of attendance of each immigrant student, and if any such institution of learning fails to make such reports promptly the approval shall be withdrawn.

QUOTA IMMIGRANTS.

Sec. 5. When used in this act the term "quota immigrant" means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this act as a non-quota immigrant or a non-immigrant shall not be admitted as a non-quota immigrant or a non-immigrant by reason of being excepted from the operation of any other law regulating or forbidding immigration.

PREFERENCES WITHIN QUOTAS.

Sec. 6. (a) In the issuance of immigration visas to quota immigrants preferences shall be given

(1) To a quota immigrant who is the unmarried child under 21 years of age, the father, the mother, the husband, or the wife, of a citizen of the United States who is 21 years of age or over; and

(2) To a quota immigrant who is skilled in agriculture, and his wife, and his dependent children under the age of 16 years, if accompanying or following to join him. The preference provided in this paragraph shall not apply to immigrants of any nationality the annual quota for which is less than 300.

(b) The preference provided in subdivision (a) shall not in the case of quota immigrants of any nationality exceed 50 per centum of the annual quota for such nationality. Nothing in this section shall be construed to grant to the class of immigrants specified in paragraph (1) of subdivision (a) a priority in preference over the class specified in paragraph (2).

(c) The preference provided in this section shall, in the case of quota immigrants of any nationality, be given in the calendar month in which the right to preference is established, if the number of immigration visas which may be issued in such month to quota immigrants of such nationality has not already been issued; otherwise in the next calendar month.

APPLICATION FOR IMMIGRATION VISA.

Sec. 7. (a) Every immigrant applying for an immigration visa shall make application therefor in duplicate in such form as shall be by regulations prescribed.

(b) In the application the immigrant shall state (1) the immigrant's full and true name; age, sex, and race; the date and place of birth; places of residence for the five years immediately preceding his application; whether married or single, and the names and places of residence of wife or husband and minor children, if any; calling or occupation; personal description (including height, complexion, color of hair and eyes, and marks of identification); ability to speak, read and write; names and addresses of parents, and if neither parent living, then the name and address of his nearest relative in the country from which he comes; port of entry into the United States; final destination, if any, beyond the port of entry;

whether he has a ticket through to such final destination; whether going to join a relative or friend, and, if so, what relative or friend and his name and complete address; the purpose for which he is going to the United States; the length of time he intends to remain in the United States; whether or not he intends to abide in the United States permanently; whether ever in prison or almshouse; whether he or either of his parents has ever been in an institution or hospital for the care and treatment of the insane; (2) if he claims to be a non-quota immigrant, the facts on which he bases such claim; and (3) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws, as may be by regulations prescribed.

(c) The immigrant shall furnish, if available, to the consular officer, with his application, two copies of his "dossier" and prison record and military record, two certified copies of his birth certificate, and two copies of all other available public records concerning him kept by the Government to which he owes allegiance. One copy of the documents so furnished shall be permanently attached to each copy of the application and become a part thereof. An immigrant having an unexpired permit issued under the provisions of section 10 shall not be subject to this subdivision. In the case of an application made before September 1, 1924, if it appears to the satisfaction of the consular officer that the immigrant has obtained a visa of his passport before the enactment of this act, and is unable to obtain the documents referred to in this subdivision without undue expense and delay, owing to absence from the country from which such documents should be obtained, the consular officer may relieve such immigrant from the requirements of this subdivision.

(d) In the application the immigrant shall also state (to such extent as shall be by regulations prescribed) whether or not he is a member of each class of individuals excluded from admission to the United States under the immigration laws, and such classes shall be stated on the blank in such form as shall be by regulations prescribed, and the immigrant shall answer separately as to each class.

(e) If the immigrant is unable to state that he does not come within any of the excluded classes, but claims to be for any legal reason exempt from exclusion, he shall state fully in the application the grounds for such alleged exemption.

(f) Each copy of the application shall be signed by the immigrant in the presence of the consular officer and verified by the oath of the immigrant administered by the consular officer. One copy of the application, when visaed by the consular officer, shall become the immigration visa, and the other copy shall be disposed of as may be by regulations prescribed.

(g) In the case of an immigrant under eighteen years of age the application may be made and verified by such individual as shall be by regulations prescribed.

(h) A fee of \$1 shall be charged for furnishing and verification of each application, which shall include the furnishing and verification of the duplicate, and shall be covered into the Treasury as miscellaneous receipts.

NON-QUOTA IMMIGRANT VISAS.

Sec. 8. A consular officer may, subject to the limitations provided in sections 2 and 9, issue an immigration visa to a non-quota immigrant as such upon satisfactory proof, under regulations prescribed under this act, that the applicant is entitled to be regarded as a non-quota immigrant.

ISSUANCE OF IMMIGRATION VISAS TO RELATIVES.

Sec. 9. (a) In case of any immigrant claiming in his application for an

immigration visa to be a non-quota immigrant by reason of relationship under the provisions of subdivision (a) of section 4, or to be entitled to preference by reason of relationship to a citizen of the United States under the provisions of section 6, the consular officer shall not issue such immigration visa or grant such preference until he has been authorized to do so as hereinafter in this section provided.

(b) Any citizen of the United States claiming that any immigrant is his relative, and that such immigrant is properly admissible to the United States as a non-quota immigrant under the provisions of subdivision (a) of section 4 or is entitled to preference as a relative, under section 6, may file with the Commissioner-General a petition in such form as may be by regulations prescribed, stating (1) the petitioner's name and address; (2) if a citizen by birth, the date and place of his birth; (3) if a naturalized citizen, the date and place of his admission to citizenship and the number of his certificate, if any; (4) the name and address of his employer or the address of his place of business or occupation if he is not an employee; (5) the degree of the relationship of the immigrant for whom such petition is made, and the names of all the places where such immigrant has resided prior to and at the time when the petition is filed; (6) that the petitioner is able to and will support the immigrant if necessary to prevent such immigrant from becoming a public charge; and (7) such additional information necessary to the proper enforcement of the immigration laws and the naturalization laws as may be by regulations prescribed.

(c) The petition shall be made under oath administered by any individual having power to administer oaths, if executed in the United States, but, if executed outside the United States, administered by a consular officer. The petition shall be supported by any documentary evidence required by regulations prescribed under this act. Application may be made in the same petition for admission of more than one individual.

(d) The petition shall be accompanied by the statements of two or more responsible citizens of the United States, to whom the petitioner has been personally known for at least one year, that to the best of their knowledge and belief the statements made in the petition are true and the petitioner is a responsible individual able to support the immigrant or immigrants for whose admission application is made. These statements shall be attested in the same way as the petition.

(e) If the Commissioner-General finds the facts stated in the petition to be true, and that the immigrant in respect of whom the petition is made is entitled to be admitted to the United States as a non-quota immigrant under subdivision (a) of section 4 or is entitled to preference as a relative under section 6, he shall, with the approval of the Secretary of Labor, inform the Secretary of State of his decision, and the Secretary of State shall then authorize the consular officer with whom the application for the immigration visa has been filed to issue the immigration visa or grant the preference.

(f) Nothing in this section shall be construed to entitle an immigrant, in respect of whom a petition under this section is granted, to enter the United States as a non-quota immigrant, if, upon arrival in the United States, he is found not to be a non-quota immigrant.

PERMIT TO RE-ENTER UNITED STATES AFTER TEMPORARY ABSENCE.

Sec. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner-General for a permit to re-enter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations

prescribed, and shall be accompanied by two copies of the applicant's photograph.

(b) If the Commissioner-General finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Secretary of Labor, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions as shall be by regulations prescribed.

(d) For the issuance of the permit, and for each extension thereof, there shall be paid a fee of \$3, which shall be covered into the Treasury as miscellaneous receipts.

(e) Upon the return of the alien to the United States the permit shall be surrendered to the immigration officer at the port of inspection.

(f) A permit issued under this section shall have no effect under the immigration laws; except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning.

NUMERICAL LIMITATIONS.

Sec. 11. (a) The annual quota of any nationality shall be 2 per centum of the number of foreign-born individuals of such nationality resident in continental United States as determined by the United States census of 1890, but the minimum quota of any nationality shall be 100.

(b) The annual quota of any nationality for the fiscal year beginning July 1, 1927, and for each fiscal year thereafter, shall be a number which bears the same ratio to 150,000 as the number of inhabitants in continental United States in 1920 having that national origin (ascertained as hereinafter provided in this section) bears to the number of inhabitants in continental United States in 1920, but the minimum quota of any nationality shall be 100.

(c) For the purpose of subdivision (b) national origin shall be ascertained by determining as nearly as may be, in respect of each geographical area which under section 12 is to be treated as a separate country (except the geographical areas specified in subdivision (c) of section 4) the number of inhabitants in continental United States in 1920 whose origin by birth or ancestry is attributable to such geographical area. Such determination shall not be made by tracing the ancestors or descendants of particular individuals, but shall be based upon statistics of immigration and emigration, together with rates of increase of population as shown by successive decennial United States censuses, and such other data as may be found to be reliable.

(d) For the purpose of subdivisions (b) and (c) the term "inhabitants in continental United States in 1920" does not include (1) immigrants from the geographical areas specified in subdivision (c) of section 4 or their descendants, (2) aliens ineligible to citizenship or their descendants, (3) the descendants of slave immigrants, or (4) the descendants of American aborigines.

(e) The determination provided for in subdivision (c) of this section shall be made by the Secretary of State, the Secretary of Commerce, and

the Secretary of Labor, jointly. In making such determination such officials may call for information and expert assistance from the bureau of the census. Such officials shall jointly report to the President the quota of each nationality, determined as provided in subdivision (b), and the President shall proclaim and make known the quotas so reported. Such proclamation shall be made on or before April 1, 1927. If the proclamation is not made on or before such date, quotas proclaimed therein shall not be in effect for any fiscal year beginning before the expiration of 90 days after the date of the proclamation. After the making of a proclamation under this subdivision the quotas proclaimed therein shall continue with the same effect as if specifically stated herein, and shall be final and conclusive for every purpose except (1) in so far as it is made to appear to the satisfaction of such officials and proclaimed by the President, that an error of fact has occurred in such determination or in such proclamation, or (2) in the case provided for in subdivision (c) of section 12. If for any reason quotas proclaimed under this subdivision are not in effect for any fiscal year, quotas for such year shall be determined under subdivision (a) of this section.

(f) There shall be issued to quota immigrants of any nationality (1) no more immigration visas in any fiscal year than the quota for such nationality, and (2) in any calendar month of any fiscal year no more immigration visas than 10 per centum of the quota for such nationality, except that if such quota is less than 300 the number to be issued in any calendar month shall be prescribed by the Commissioner-General, with the approval of the Secretary of Labor, but the total number to be issued during the fiscal year shall not be in excess of the quota for such nationality.

(g) Nothing in this act shall prevent the issuance (without increasing the total number of immigration visas which may be issued) of an immigration visa to an immigrant as a quota immigrant even though he is a non-quota immigrant.

NATIONALITY.

Sec. 12. (a) For the purposes of this act nationality shall be determined by country of birth, treating as separate countries the colonies, dependencies, or self-governing dominions, for which separate enumeration was made in the United States census of 1890; except that (1) the nationality of a child under twenty-one years of age not born in the United States, accompanied by its alien parent not born in the United States, shall be determined by the country of birth of such parent if such parent is entitled to an immigration visa, and the nationality of a child under twenty-one years of age not born in the United States, accompanied by both alien parents not born in the United States, shall be determined by the country of birth of the father if the father is entitled to an immigration visa; and (2) if a wife of a different nationality from her alien husband and the entire number of immigration visas which may be issued to quota immigrants of her nationality for the calendar month has already been issued, her nationality may be determined by the country of birth of her husband if she is accompanying him and he is entitled to an immigration visa, unless the total number of immigration visas which may be issued to quota immigrants of the nationality of the husband for the calendar month has already been issued. An immigrant born in the United States who has lost his United States citizenship shall be considered as having been born in the country of which he is a citizen or subject, or if he is not a citizen or subject of any country, then in the country from which he comes.

(b) The Secretary of State, the Secretary of Commerce, and the Secretary of Labor, jointly, shall, as soon as feasible after the enactment of this act, prepare a statement showing the number of individuals of the various nationalities resident in continental United States as determined by the United States census of 1890, which statement shall be the population basis for the purposes of subdivision (a) of section 11. In the case of a country recognized by the United States, but for which a separate enumeration was not made in the census of 1890, the number of individuals born in such country and resident in continental United States in 1890, as estimated by such officials jointly, shall be considered for the purposes of subdivision (a) of section 11 as having been determined by the United States census of 1890. In the case of a colony or dependency existing before 1890, but for which a separate enumeration was not made in the census of 1890 and which was not included in the enumeration for the country to which such colony or dependency belonged, or in the case of territory administered under a protectorate, the number of individuals born in such colony, dependency, or territory, and resident in continental United States in 1890, as estimated by such officials jointly, shall be considered for the purposes of subdivision (a) of section 11 as having been determined by the United States census of 1890 to have been born in the country to which such colony or dependency belonged or which administers such protectorate.

(c) In case of changes in political boundaries in foreign countries occurring subsequent to 1890 and resulting in the creation of new countries, the Governments of which are recognized by the United States, or in the establishment of self-governing dominions, or in the transfer of territory from one country to another, such transfer being recognized by the United States, or in the surrender by one country of territory, the transfer of which to another country has not been recognized by the United States, or in the administration of territories under mandates, (1) such officials, jointly, shall estimate the number of individuals resident in continental United States in 1890 who were born within the area included in such new countries or self-governing dominions or in such territory so transferred or surrendered, or administered under a mandate, and revise (for the purposes of subdivision (a) of section 11) the population basis as to each country involved in such change of political boundary, and (2) if such changes in political boundaries occur after the determination provided for in subdivision (c) of section 11 has been proclaimed, such officials, jointly, shall revise such determination, but only so far as necessary to allot the quotas among the countries involved in such change of political boundary. For the purpose of such revision and for the purpose of determining the nationality of an immigrant, (A) aliens born in the area included in any such new country or self-governing dominion shall be considered as having been born in such country or dominion, and aliens born in any territory so transferred shall be considered as having been born in the country to which such territory was transferred, and (B) territory so surrendered or administered under a mandate shall be treated as a separate country. Such treatment of territory administered under a mandate shall not constitute consent by the United States to the proposed mandate where the United States has not consented in a treaty to the administration of the territory by a mandatory power.

(d) The statements, estimates, and revisions provided in this section shall be made annually, but for any fiscal year for which quotas are in effect as proclaimed under subdivision (e) of section 11, shall be made only (1) for the purpose of determining the nationality of immigrants

seeking admission to the United States during such year, or (2) for the purposes of clause (2) of subdivision (c) of this section.

(e) Such officials shall, jointly, report annually to the President the quota of each nationality under subdivision (a) of section 11, together with the statements, estimates, and revisions provided for in this section. The President shall proclaim and make known the quotas so reported and thereafter such quotas shall continue, with the same effect as if specifically stated herein, for all fiscal years except those years for which quotas are in effect as proclaimed under subdivision (e) of section 11, and shall be final and conclusive for every purpose.

EXCLUSION FROM UNITED STATES.

Sec. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3.

(d) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under clause (2) or (3) of subdivision (a) of this section, if satisfied that such inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, such immigrant prior to the departure of the vessel from the last port outside the United States and outside foreign contiguous territory, or, in the case of an immigrant coming from foreign contiguous territory, prior to the application of the immigrant for admission.

(e) No quota immigrant shall be admitted under subdivision (d) if the entire number of immigration visas which may be issued to quota immigrants of the same nationality for the fiscal year has already been issued. If such entire number of immigration visas has not been issued, then the Secretary of State, upon the admission of a quota immigrant under subdivision (d), shall reduce by one the number of immigration visas which may be issued to quota immigrants of the same nationality during the fiscal year in which such immigrant is admitted; but if the Secretary of State finds that it will not be practicable to make such reduction before the end of such fiscal year, then such immigrant shall not be admitted.

(f) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has accrued under section 16.

DEPORTATION.

Sec. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this act to enter the United States, or to have remained therein for a longer time than permitted under this act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19

and 20 of the Immigration Act of 1917: Provided, that the Secretary of Labor may, under such conditions and restrictions as to support and care as he may deem necessary, permit permanently to remain in the United States, any alien child who, when under sixteen years of age, was heretofore temporarily admitted to the United States, and who is now within the United States and either of whose parents is a citizen of the United States.

MAINTENANCE OF EXEMPT STATUS.

Sec. 15. The admission to the United States of an alien excepted from the class of immigrants by clauses (2), (3), (4), (5), or (6) of section 3, or declared to be a non-quota immigrant by subdivision (e) of section 4, shall be for such time as may be by regulations prescribed, and under such conditions as may be by regulations prescribed (including, when deemed necessary for the classes mentioned in clauses (2), (3), (4), or (6) of section 3, the giving of bond with sufficient surety, in such sum and containing such conditions as may be by regulations prescribed) to insure that, at the expiration of such time or upon failure to maintain the status under which admitted, he will depart from the United States.

PENALTY FOR ILLEGAL TRANSPORTATION.

Sec. 16. (a) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

(b) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person, or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of \$1000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(c) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer, and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence, (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a non-quota immigrant.

ENTRY FROM FOREIGN CONTIGUOUS TERRITORY.

Sec. 17. The Commissioner-General, with the approval of the Secretary of Labor, shall have power to enter into contracts with transportation lines

for the entry and inspection of aliens coming to the United States from or through foreign contiguous territory. In prescribing rules and regulations and making contracts for the entry and inspection of aliens applying for admission from or through foreign contiguous territory due care shall be exercised to avoid any discriminatory action in favor of transportation companies transporting to such territory aliens destined to the United States, and all such transportation companies shall be required, as a condition precedent to the inspection or examination under such rules and contracts at the ports of such contiguous territory of aliens brought thereto by them, to submit to and comply with all the requirements of this act which would apply were they bringing such aliens directly to ports of the United States. After this section takes effect no alien applying for admission from or through foreign contiguous territory (except an alien previously lawfully admitted to the United States who is returning from a temporary visit to such territory) shall be permitted to enter the United States unless upon proving that he was brought to such territory by a transportation company which had submitted to and complied with all the requirements of this act, or that he entered, or has resided in, such territory more than two years prior to the time of his application for admission to the United States.

UNUSED IMMIGRATION VISAS.

Sec. 18. If a quota immigrant of any nationality having an immigration visa is excluded from admission to the United States under the immigration laws and deported, or does not apply for admission to the United States, before the expiration of the validity of the immigration visa, or if an alien of any nationality having an immigration visa issued to him as a quota immigrant is found not to be a quota immigrant, no additional immigration visa shall be issued in lieu thereof to any other immigrant.

ALIEN SEAMAN.

Sec. 19. No alien seaman excluded from admission into the United States under the immigration laws and employed on board any vessel arriving in the United States from any place outside thereof, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to such regulations as the Secretary of Labor may prescribe for the ultimate departure, removal, or deportation of such alien from the United States.

Sec. 20. (a) The owner, charterer, agent, consignee, or master of any vessel arriving in the United States from any place outside thereof who fails to detain on board any alien seaman employed on such vessel until the immigration officer in charge at the port of arrival has inspected such seaman (which inspection in all cases shall include a personal physical examination by the medical examiners), or who fails to detain such seaman on board after such inspection or to deport such seaman if required by such immigration officer or the Secretary of Labor to do so, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of \$1000 for each alien seaman in respect of whom such failure occurs. No vessel shall be granted clearance pending the determination of the liability to the payment of such fine, or while the fine remains unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(b) Proof that an alien seaman did not appear upon the outgoing mani-

fest of the vessel on which he arrived in the United States from any place outside thereof, or that he was reported by the master of such vessel as a deserter, shall be *prima facie* evidence of a failure to detain or deport after requirement by the immigration officer or the Secretary of Labor.

(c) If the Secretary of Labor finds that deportation of the alien seaman on the vessel on which he arrived would cause undue hardship to such seaman he may cause him to be deported on another vessel at the expense of the vessel on which he arrived, and such vessel shall not be granted clearance until such expense has been paid or its payment guaranteed to the satisfaction of the Secretary of Labor.

(d) Section 32 of the Immigration Act of 1917 is repealed, but shall remain in force as to all vessels, their owners, agents, consignees, and masters, and as to all seamen, arriving in the United States prior to the enactment of this act.

PREPARATION OF DOCUMENTS.

Sec. 21. (a) Permits issued under section 10 shall be printed on distinctive safety paper and shall be prepared and issued under regulations prescribed under this act.

(b) The Public Printer is authorized to print for sale to the public by the superintendent of public documents, upon prepayment, additional copies of blank forms of manifests and crew lists to be prescribed by the Secretary of Labor pursuant to the provisions of sections 12, 13, 14 and 36 of the Immigration Act of 1917.

OFFENSES IN CONNECTION WITH DOCUMENTS.

Sec. 22. (a) Any person who knowingly (1) forges, counterfeits, alters, or falsely makes any immigration visa or permit, or (2) utters, uses, attempts to use, possesses, obtains, accepts, or receives any immigration visa or permit, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or who, except under direction of the Secretary of Labor or other proper officer, knowingly (3) possesses any blank permit, (4) engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, (5) makes any print, photograph, or impression in the likeness of any immigration visa or permit, or (6) has in his possession a distinctive paper which has been adopted by the Secretary of Labor for the printing of immigration visas or permits, shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

(b) Any individual who (1) when applying for an immigration visa or permit, or for admission to the United States, personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name, or (2) sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, an immigration visa or permit, to any person not authorized by law to receive such document, shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

(c) Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

BURDEN OF PROOF.

Sec. 23. Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; and in any deportation proceeding against any alien the burden of proof shall be upon such alien to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, but in presenting such proof he shall be entitled to the production of his immigration visa, if any, or of other documents concerning such entry, in the custody of the Department of Labor.

RULES AND REGULATIONS.

Sec. 24. The Commissioner-General, with the approval of the Secretary of Labor, shall prescribe rules and regulations for the enforcement of the provisions of this act; but all such rules and regulations, in so far as they relate to the administration of this act by consular officers, shall be prescribed by the Secretary of State on the recommendation of the Secretary of Labor.

ACT TO BE IN ADDITION TO IMMIGRATION LAWS.

Sec. 25. The provisions of this act are in addition to and not in substitution for the provisions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this act. An alien, although admissible under the provisions of this act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this act, and an alien, although admissible under the provisions of the immigration laws other than this act, shall not be admitted to the United States if he is excluded by any provision of this act.

STEAMSHIP FINES UNDER 1917 ACT.

Sec. 26. Section 9 of the Immigration Act of 1917 is amended to read as follows:

"Sec. 9. That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States either from a foreign country or any insular possession of the United States any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation, and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of \$1000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival for each and every violation of the provisions of this section, such latter sum to be delivered by the collector of customs to the alien on whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien afflicted

with any mental defect other than those above specifically named, or physical defect of a nature which may affect his ability to earn a living, as contemplated in section 3 of this act, and if it shall appear to the satisfaction of the Secretary of Labor that any alien so brought to the United States was so afflicted at the time of foreign embarkation, and that the existence of such mental or physical defect might have been detected by means of a competent medical examination at such time, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of \$250, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien for whose account assessed. It shall also be unlawful for any such person to bring to any port of the United States any alien who is excluded by the provisions of section 3 of this act because unable to read, or who is excluded by the terms of section 3 of this act as a native of that portion of the Continent of Asia and the islands adjacent thereto described in said section, and if it shall appear to the satisfaction of the Secretary of Labor that these disabilities might have been detected by the exercise of reasonable precaution prior to the departure of such aliens from a foreign port, such person shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of \$1000, and in addition a sum equal to that paid by such alien for his transportation from the initial point of departure, indicated in his ticket, to the port of arrival, for each and every violation of this provision, such latter sum to be delivered by the collector of customs to the alien on whose account assessed.

"If a fine is imposed under this section for the bringing of an alien to the United States, and if such alien is accompanied by another alien who is excluded from admission by the last proviso of section 18 of this act, the person liable for such fine shall pay to the collector of customs, in addition to such fine but as a part thereof, a sum equal to that paid by such accompanying alien for his transportation from his initial point of departure indicated in his ticket, to the point of arrival, such sum to be delivered by the collector of customs to the accompanying alien when deported. And no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fines, or while the fines remain unpaid, nor shall such fines be remitted or refunded: Provided, that clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover such fines or of a bond with sufficient surety to secure the payment thereof, approved by the collector of customs: Provided further, that nothing contained in this section shall be construed to subject transportation companies to a fine for bringing to ports of the United States aliens who are by any of the provisos or exceptions to section 3 of this act exempted from the excluding provisions of said section."

Sec. 27. Section 10 of the Immigration Act of 1917 is amended to read as follows:

"Sec. 10. (a) That it shall be the duty of every person, including owners, masters, officers, and agents of vessels of transportation lines, or international bridges or toll roads, other than railway lines which may enter into a contract as provided in section 23, bringing an alien to, or providing a means for an alien to come to, the United States, to prevent the landing of such alien in the United States at any time or place other

than as designated by the immigration officers. Any such person, owner, master, officer, or agent who fails to comply with the foregoing requirements shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine in each case of not less than \$200 nor more than \$1000, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; or, if in the opinion of the Secretary of Labor, it is impracticable or inconvenient to prosecute the person, owner, master, officer, or agent of any such vessel, such person, owner, master, officer, or agent shall be liable to a penalty of \$1000, which shall be a lien upon the vessel whose owner, master, officer, or agent violates the provisions of this section, and such vessel shall be libeled therefor in the appropriate United States court.

“(b) Proof that the alien failed to present himself at the time and place designated by the immigration officers shall be *prima facie* evidence that such alien has landed in the United States at a time or place other than as designated by the immigration officers.”

GENERAL DEFINITIONS.

Sec. 28. As used in this act—

(a) The term “United States,” when used in a geographical sense, means the states, the territories of Alaska and Hawaii, the District of Columbia, Porto Rico, and the Virgin Islands; and the term “continental United States” means the states and the District of Columbia;

(b) The term “alien” includes any individual not a native-born or naturalized citizen of the United States, but this definition shall not be held to include Indians of the United States not taxed, nor citizens of the islands under the jurisdiction of the United States;

(c) The term “ineligible to citizenship,” when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under section 2169 of the Revised Statutes, or under section 14 of the act entitled “An act to execute certain treaty stipulations relating to Chinese,” approved May 6, 1882, or under sections 1996, 1997, or 1998 of the Revised Statutes, as amended, or under section 2 of the act entitled “An act to authorize the President to increase temporarily the Military Establishment of the United States,” approved May 18, 1917, as amended, or under law amendatory of, supplementary to, or in substitution for, any of such sections;

(d) The term “immigration visa” means an immigration visa issued by a consular officer under the provisions of this act;

(e) The term “consular officer” means any consular or diplomatic officer of the United States designated, under regulations prescribed under this act, for the purpose of issuing immigration visas under this act. In case of the Canal Zone and the insular possessions of the United States the term “consular officer” (except as used in section 24) means an officer designated by the President, or by his authority, for the purpose of issuing immigration visas under this act;

(f) The term “Immigration Act of 1917” means the Act of February 5, 1917, entitled “An act to regulate the immigration of aliens to, and the residence of aliens in, the United States”;

(g) The term “immigration laws” includes such act, this act, and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, or expulsion of aliens;

(h) The term “person” includes individuals, partnerships, corporations, and associations;

(i) The term "Commissioner-General" means the Commissioner-General of Immigration;

(j) The term "application for admission" has reference to the application for admission to the United States and not to the application for the issuance of the immigration visa;

(k) The term "permit" means a permit issued under section 10;

(l) The term "unmarried," when used in reference to any individual as of any time, means an individual who at such time is not married, whether or not previously married;

(m) The terms "child," "father," and "mother," do not include a child or parent by adoption unless the adoption took place before January 1, 1924;

(n) The terms "wife" and "husband" do not include a wife or husband by reason of a proxy or picture marriage.

AUTHORIZATION OF APPROPRIATION.

Sec. 29. The appropriation of such sums as may be necessary for the enforcement of this act is hereby authorized.

ACT OF MAY 19, 1921.

Sec. 30. The act entitled "An act to limit the immigration of aliens into the United States," approved May 19, 1921, as amended and extended, shall, notwithstanding its expiration of June 30, 1924, remain in force thereafter for the imposition, collection, and enforcement of all penalties that may have accrued thereunder, and any alien who prior to July 1, 1924, may have entered the United States in violation of such act or regulations made thereunder may be deported in the same manner as if such act had not expired.

TIME OF TAKING EFFECT.

Sec. 31. (a) Sections 2, 8, 13, 14, 15, and 16, and subdivision (f) of section 11, shall take effect on July 1, 1924, except that immigration visas and permits may be issued prior to that date, which shall not be valid for admission to the United States before July 1, 1924. In the case of quota immigrants of any nationality, the number of immigration visas to be issued prior to July 1, 1924, shall not be in excess of 10 per centum of the quota for such nationality, and the number of immigration visas so issued shall be deducted from the number which may be issued during the month of July, 1924. In the case of immigration visas issued before July 1, 1924, the four-month period referred to in subdivision (c) of section 2 shall begin to run on July 1, 1924, instead of at the time of the issuance of the immigration visa.

(b) The remainder of this act shall take effect upon its enactment.

(c) If any alien arrives in the United States before July 1, 1924, his right to admission shall be determined without regard to the provisions of this act, except section 23.

SAVING CLAUSE IN EVENT OF UNCONSTITUTIONALITY.

Sec. 32. If any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Approved, May 26, 1924.

CHAPTER IV.

JAPANESE-AMERICAN TREATY.

COMMERCE AND NAVIGATION—SUPERSEDING THE TREATY OF NOVEMBER 22, 1894.

Signed at Washington February 21, 1911; ratification advised by the Senate, with amendment, February 24, 1911; ratified by the President March 2, 1911; ratified by Japan March 31, 1911; ratifications exchanged at Tokyo April 4, 1911; proclaimed April 5, 1911.

Articles.

- I. Mutual freedom of trade, travel, etc.; taxes, and exemption from military service.
- II. Inviolability of dwellings, etc.
- III. Consular officers.
- IV. Reciprocal freedom of commerce and navigation.
- V. Import and export duties.
- VI. Transit dues.
- VII. Corporations.
- VIII. Equality of shipping.
- IX. Privileges respecting stationing, loading, etc., vessels.
- X. Nationality of vessels.
- XI. Tonnage, etc., dues.
- XII. Vessels in postal service.
- XIII. Coasting trade.
- XIV. Favored-nation privilege.
- XV. Patents, trade-marks, and designs.
- XVI. Treaty of 1894 superseded.
- XVII. Effect; duration.
- XVIII. Ratification.

The President of the United States of America and His Majesty the Emperor of Japan, being desirous to strengthen the relations of amity and good understanding which happily exist between the two nations, and believing that the fixation in a manner clear and positive of the rules which are hereafter to govern the commercial intercourse between their respective countries will contribute to the realization of this most desirable result, have resolved to conclude a Treaty of Commerce and Navigation for that purpose, and to that end have named their plenipotentiaries, that is to say:

The President of the United States of America, Philander C. Knox, Secretary of State of the United States; and

His Majesty the Emperor of Japan, Baron Yasuya Uchida, Jusammi, Grand Cordon of the Imperial Order of the Rising Sun, His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States of America;

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed upon the following articles:

Article I.

The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to

carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the high contracting parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions.

Article II.

The dwellings, warehouses, manufactories and shops of the citizens or subjects of each of the high contracting parties in the territories of the other, and all premises appertaining thereto used for purposes of residence or commerce, shall be respected. It shall not be allowable to proceed to make a domiciliary visit to, or a search of, any such buildings and premises, or to examine or inspect books, papers or accounts, except under the conditions and with the forms prescribed by the laws, ordinances and regulations for nationals.

Article III.

Each of the high contracting parties may appoint consuls-general, consuls, vice consuls, deputy consuls and consular agents in all ports, cities and places of the other, except in those where it may not be convenient to recognize such officers. This exception, however, shall not be made in regard to one of the contracting parties without being made likewise in regard to all other powers.

Such consuls-general, consuls, vice consuls, deputy consuls and consular agents, having received exequaturs or other sufficient authorizations from the Government of the country to which they are appointed, shall, on condition of reciprocity, have the right to exercise the functions and to enjoy the exemptions and immunities which are or may hereafter be granted to the consular officers of the same rank of the most favored nation. The Government issuing exequaturs or other authorizations may in its discretion cancel the same on communicating the reasons for which it thought proper to do so.

Article IV.

There shall be between the territories of the two high contracting parties reciprocal freedom of commerce and navigation. The citizens or subjects of each of the contracting parties, equally with the citizens or subjects of the most favored nation, shall have liberty freely to come with their ships and cargoes to all places, ports and rivers in the territories of the other which are or may be opened to foreign commerce, subject always to the laws of the country to which they thus come.

Article V.

The import duties on articles, the produce or manufacture of the territories of one of the high contracting parties, upon importation into the territories of the other, shall henceforth be regulated either by treaty between the two countries or by the internal legislation of each.

Neither contracting party shall impose any other or higher duties or charges on the exportation of any articles to the territories of the other than are or may be payable on the exportation of the like article to any other foreign country.

Nor shall any prohibition be imposed by either country on the importation or exportation of any article from or to the territories of the other which shall not equally extend to the like article imported from or exported to any other country. The last provision is not, however, applicable to prohibitions or restrictions maintained or imposed as sanitary measures or for purposes of protecting animals and useful plants.

Article VI.

The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other exemption from all transit duties and a perfect equality of treatment with native citizens or subjects in all that relates to warehousing, bounties, facilities and drawbacks.

Article VII.

Limited-liability and other companies and associations, commercial, industrial, and financial, already or hereafter to be organized in accordance with the laws of either high contracting party and domiciled in the territories of the other, to exercise their rights and appear in the courts either as plaintiffs or defendants, subject to the laws of such other party.

The foregoing stipulation has no bearing upon the question whether a company or association organized in one of the two countries will or will not be permitted to transact its business or industry in the other, this permission remaining always subject to the laws and regulations enacted or established in the respective countries or in any part thereof.

Article VIII.

All articles which are or may be legally imported into the ports of either high contracting party from foreign countries in national vessels may likewise be imported into those ports in vessels of the other contracting party, without being liable to any other or higher duties or charges of whatever denomination than if such articles were imported in national vessels. Such reciprocal equality of treatment shall take effect without distinction, whether such articles come directly from the place of origin or from any other foreign place.

In the same manner, there shall be perfect equality of treatment in regard to exportation, so that the same export duties shall be paid, and the same bounties and drawbacks allowed, in the territories of each of the contracting parties on the exportation of any article which is or may be legally exported therefrom, whether such exportation shall take place in vessels of the United States or in Japanese vessels, and whatever may be the place of destination, whether a port of the other party or of any third power.

Article IX.

In all that regards the stationing, loading and unloading of vessels in the ports of the territories of the high contracting parties, no privileges shall be granted by either party to national vessels which are not equally,

in all cases, granted to the vessels of the other country; the intention of the contracting parties being that in these respects the respective vessels shall be treated on the footing of perfect equality.

Article X.

Merchant vessels navigating under the flag of the United States or that of Japan and carrying the papers required by their national laws to prove their nationality shall in Japan and in the United States be deemed to be vessels of the United States or of Japan respectively.

Article XI.

No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties of whatever denomination, levied in the name of or for the profit of Government, public functionaries, private individuals, corporations or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels in general, or on vessels of the most favored nation. Such equality of treatment shall apply reciprocally to the respective vessels from whatever place they may arrive and whatever may be their place of destination.

Article XII.

Vessels charged with performance of regular scheduled postal service of one of the high contracting parties, whether belonging to the state or subsidized by it for the purpose, shall enjoy, in the ports of the territories of the other, the same facilities, privileges and immunities as are granted to like vessels of the most favored nation.

Article XIII.

The coasting trade of the high contracting parties is excepted from the provisions of the present treaty and shall be regulated according to the laws of the United States and Japan, respectively. It is, however, understood that the citizens or subjects of either contracting party shall enjoy in this respect most-favored-nation treatment in the territories of the other.

A vessel of one of the contracting parties, laden in a foreign country with cargo destined for two or more ports of entry in the territories of the other, may discharge a portion of her cargo at one of the said ports, and, continuing her voyage to the other port or ports of destination, there discharge the remainder of her cargo, subject always to the laws, tariffs and customs regulations of the country of destination; and, in like manner and under the same reservations, the vessels of one of the contracting parties shall be permitted to load at several ports of the other for the same outward voyages.

Article XIV.

Except as otherwise expressly provided in this treaty, the high contracting parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either contracting party has actually granted, or may hereafter grant, to the citizens or subjects of any other state shall be extended to the citizens or subjects of the other contracting party gratuitously, if the concession in favor of that other state shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional.

Article XV.

The citizens or subjects of each of the high contracting parties shall enjoy in the territories of the other the same protection as native citizens

or subjects in regard to patents, trade-marks and designs, upon fulfillment of the formalities prescribed by law.

Article XVI.

The present treaty shall, from the date on which it enters into operation, supersede the Treaty of Commerce and Navigation dated the 22nd day of November, 1894; and from the same date the last-named treaty shall cease to be binding.

Article XVII.

The present treaty shall enter into operation on the 17th of July, 1911, and shall remain in force twelve years or until the expiration of six months from the date on which either of the contracting parties shall have given notice to the other of its intention to terminate the treaty.

In case neither of the contracting parties shall have given notice to the other six months before the expiration of the said period of twelve years of its intention to terminate the treaty, it shall continue operative until the expiration of six months from the date on which either party shall have given such notice.

Article XVIII.

The present treaty shall be ratified and the ratifications thereof shall be exchanged at Tokyo as soon as possible and not later than three months from the present date.

In witness whereof, I have hereunto set my hand and caused the seal treaty in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd month of the 44th year of Meiji.

PHILANDER C. KNOX. (Seal)

Y. UCHIDA. (Seal)

And whereas, the advice and consent of the Senate of the United States to the ratification of the said treaty was given, with the understanding "that the treaty shall not be deemed to repeal or affect any of the provisions of the act of Congress entitled 'An act to regulate the immigration of aliens into the United States,' approved February 20th, 1907";

And whereas, the said understanding has been accepted by the Government of Japan;

And whereas, the said treaty, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Tokyo on the fourth day of April, one thousand nine hundred and eleven;

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said treaty, as amended, and the said understanding to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal)

WM. H. TAFT.

By the President:

P. C. KNOX,

Secretary of State.

DECLARATION.

In proceeding this day to the signature of the Treaty of Commerce and Navigation between Japan and the United States the undersigned, Japanese ambassador in Washington, duly authorized by his Government, has the honor to declare that the Imperial Japanese Government are fully prepared to maintain with equal effectiveness the limitation and control which they have for the past three years exercised in regulation of the emigration of laborers to the United States.

Y. UCHIDA.

February 21, 1911.

By the President of the United States of America.

A PROCLAMATION.

Whereas a protocol of a provisional tariff arrangement between the United States of America and the Empire of Japan was concluded and signed by their respective plenipotentiaries at Washington, on the twenty-first day of February, one thousand nine hundred and eleven, the original of which protocol, being in the English language, is, as amended by the Senate of the United States, word for word as follows:

PROTOCOL.

The Government of the United States of America and the Government of Japan have, through their respective plenipotentiaries, agreed upon the following stipulation in regard to article V of the Treaty of Commerce and Navigation between the United States and Japan signed this day to replace on the 17th of July, 1911, the treaty of the 22nd of November, 1894:

Pending the conclusion of a treaty relating to tariff, the provisions relating to tariff in the treaty of the 22nd of November, 1894, shall be maintained.

In witness whereof, the respective plenipotentiaries have signed this protocol in duplicate and have hereunto affixed their seals.

Done at Washington the 21st day of February, in the nineteen hundred and eleventh year of the Christian era, corresponding to the 21st day of the 2nd month of the 44th year of Meiji.

(Seal) PHILANDER C. KNOX.

(Seal) Y. UCHIDA.

And whereas, the said protocol, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratification of the two Governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred eleven;

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said protocol to be made public, to the end that the same and every article and clause thereof, as amended, may be observed and fulfilled with good faith by the United States and the citizens thereof.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this fifth day of April in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

(Seal)

WM. HOWARD TAFT.

By the President:

P. C. KNOX,

Secretary of State.

CHAPTER V.

ABSTRACT OF TREATIES AND CONVENTIONS ENTERED INTO BETWEEN THE UNITED STATES GOVERNMENT AND FOREIGN GOVERNMENTS IN REFERENCE TO PROPERTY RIGHTS OF FOREIGN SUBJECTS.

AUSTRIA.

(Proclaimed February 25, 1850.)

Reciprocal Rights.

Article I. They (inhabitants) shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their commercial affairs; and they shall enjoy, to that effect, the same security, protection and privileges as natives of the country wherein they reside, on condition of submitting to the laws and ordinances there prevailing.

Property Rights.

Art. II. When, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged, according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which such proceeds may be withdrawn.

Art. III. In the absence of heirs, the same care shall be taken, provisionally, of such real or personal property as would be taken in like case of property belonging to natives of the country, until the lawful owner or the person who has a right to sell the same, according to article II, may take measure to receive or dispose of the inheritance.

Life of Treaty.

Art. V. The present treaty shall remain in force for two years, counting from the day of exchange of ratification; and if, twelve months from before the expiration of that period, neither of the high contracting parties have announced by an official notification to the other, its intention to arrest the operation of said treaty, it shall remain binding for one year beyond that time, and so on until the expiration of the twelve months which will follow a similar notification, whatever the time at which it may take place.

Favored-nation Clause.

Art. IX. If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it is freely granted to such other nation, or on yielding the same compensation, when the grant is conditional.

BRAZIL.

(Proclaimed March 18, 1829. Life, 12 years, subject to notice of one year if not terminated at end of twelve-year period.)

Disposal of Property.

* * * and if, in the case of real estate, the said heirs would be pre-

vented from entering the possession of inheritance on account of their character of aliens, there shall be granted to them the term of three years to dispose of the same as they may think proper, and to withdraw the proceeds without molestation, nor any other charges than those that are imposed by the laws of the country.

Favored-nation Clause.

Art. II. The United States of America and His Majesty the Emperor of Brazil, desiring to live in peace and harmony with all the other nations of the earth, by means of a frank policy and equally friendly with all, engage mutually not to grant any particular favor to any other nation, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional. It is understood, however, the relations and conventions which now exist, or may hereafter exist, between Brazil and Portugal, shall form an exception to this article.

CONGO.

(Proclaimed April 2, 1892. Does not note time to last.)

Property Rights.

Art. II. In all that concerns the acquisition, succession, possession and alienation of property, real and personal, the citizens and inhabitants of each of the high contracting parties shall enjoy in the territories of the other all the rights which the respective laws accord or shall accord to the citizens and inhabitants of the most favored nation.

DOMINICAN REPUBLIC.

(Proclaimed October 24, 1867. Life, 8 years. Expires upon one year's notice, otherwise continues in force indefinitely.)

Property Rights.

Art. V. When on the decease of any person holding real estate within the territory of one party, such real estate would, by the law of the land, descend on a citizen of the other, were he not disqualified by alienage, the longest term which the laws of the country in which it is situated will permit shall be accorded to him to dispose of the same; nor shall he be subjected, in doing so, to higher duties than if he were a citizen of the country wherein such real estate is situated.

Reciprocal Rights.

Art. III. The citizens of the contracting parties shall be permitted to enter, sojourn, settle and reside in all parts of said territories, and such as may wish to engage in business shall have the right to hire and occupy warehouses, provided they submit to the laws, as well general as special, relative to the rights of traveling, residing or trading. While they conform to the laws and regulations in force, they shall be at liberty to manage themselves their own business, subject to the jurisdiction of either party, as well in respect to the consignment of goods by wholesale or retail as with respect to the loading, unloading and sending off of their ships. They may also employ such agents or brokers as they may deem proper, and shall in these cases be treated as the citizens of the country in which they reside; it being, nevertheless, distinctly understood that they shall be subject to such laws and regulations also in respect to wholesale or retail. They shall have free

access to the tribunals of justice, in cases to which they may be a party, on the same terms which are granted by the laws and usage of the country to native citizens; for which purpose they may employ in defence of their interests and rights such advocates, attorneys and other agents as they may think proper.

GREAT BRITAIN.

(1) Proclaimed February 29, 1796 (Jay Treaty).

Art. IX. It is agreed that British subjects who now hold lands in the territories of the United States, and Americans who now hold lands in the domains of His Majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise to whom they please, and in like manner as if they were natives; and that neither they nor their heirs or assigns shall, so far as may respect the said lands and their legal remedies thereto, be regarded as aliens.

(2) Proclaimed August 6, 1900.

Art. I. Where, on the death of any person holding real property (or property not personal), within the territories of one of the contracting parties, such real property would, by the laws of the land, pass to a citizen or subject of the other, were he not disqualified by the laws of the country where such real property is situated, such citizens or subjects shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and to withdraw the proceeds thereof, without restraint or interference, or charges other than those which may be imposed upon the citizens or subjects of the country from which such proceeds may be drawn.

Favored-nation Clause.

Art. V. In all that concerns the disposing of every kind of property, real and personal, citizens or subjects of each of the high contracting parties shall in the dominions of the other enjoy the rights which are or may be accorded to the citizens of the most favored nation.

Art. VI. The present convention shall come into effect ten days after the day agreed upon which the ratifications are exchanged, and shall remain in effect for ten years after such exchange. In case neither of the high contracting parties shall have given notice to the other, twelve months before the expiration of the said ten years, of the intention to terminate the present convention, it shall remain in force until the expiration of one year from the day on which either of the high contracting parties shall have given notice.

The United States or Her Britannic Majesty shall also have the right to separately terminate the present convention at any time on giving twelve months' notice to that effect on any British colony, foreign possession or dependency, as specified in article IV, which may have acceded thereto.

GUATEMALA.

(Proclaimed July 28, 1852. To remain in force 12 years, with notice of termination at end of period, or failing in that, one year's notice thereafter.)

Favored-nation Clause.

Art. II. The United States of America and the Republic of Guatemala, desiring to live in peace and harmony with all of the other nations of the world, by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other nations in respect to commerce and navigation, which shall not immediately become common to

the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.

Property Disposition.

Art. XI. If, in the case of real estate, the heirs would be prevented from entering into the possession of the inheritance on account of their character as aliens, there shall be granted to them the term of three years to dispose of the same if they think proper, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the Government of the respective States.

Reciprocal Rights.

Art. VI. It shall be wholly free for all merchants, commanders of ships, and other citizens of both countries to manage themselves their own business in all ports and places subject to the jurisdiction of each other, as well with respect to the consignment and sale of goods and merchandise, by wholesale and retail, as respect to the loading, unloading and sending off their ships; they being in all cases to be treated as citizens of the country in which they reside, or at least be placed on a footing with the subjects or citizens of the most favored nation.

(Later convention re real estate—Proclaimed September 18, 1902.)

Art. I. Adds that term of three years may be reasonably prolonged, if circumstances render it necessary.

HESSE.

(Proclaimed May 8, 1845. No term given.)

Art. II. Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a subject or citizen of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged, according to circumstances, and to withdraw the proceeds thereof, without molestation, and exempt from all duties of detraction on the part of the Government of the respective States.

Art. IV. In the absence of heirs, the same care shall be taken, provisionally, of such real or personal property as would be taken in a like case of property belonging to natives of the country, until the lawful owner, or the person who has a right to sell the same, according to article II, may take measures to receive or dispose of the inheritance.

Art. V. If any dispute should arise between different claimants to the same inheritance, they shall be decided, in the last resort, according to the laws and by the judges of the country where the property is situated.

HONDURAS.

(Proclaimed May 30, 1865. No term.)

Favored-nation Clause.

Art. III. It being the intention of the two high contracting parties to bind themselves by the preceding article, to treat each other on the footing of the most favored nation, it is hereby agreed between them that any favor, privilege, or immunity whatever, in matters of commerce and navigation, which either contracting party has actually granted, or may hereafter grant, to the subjects or citizens of any other States, shall be extended to the subjects or citizens of the other high contracting party gratuitously, if the concession in favor of that other nation shall have been gratuitous; or in

return for a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, if the concession shall have been conditional.

Art. VII. The same privileges shall be enjoyed in the territories of the United States by the citizens of the Republic of Honduras under the same conditions. (This refers to part of same clause giving trade rights to Americans in Honduras.)

Art. VIII. If any citizen of either of the two high contracting parties shall die without will or testament in any of the territories of the other, the consul-general or consul of the nation to which the deceased belonged, or the representative of such consul-general or consul in his absence shall have the right to nominate curators or take charge of the property of the deceased, so far as the laws of the country will permit, for the benefit of the lawful heirs and creditors of the deceased, giving proper notice of such nomination to the authorities of the country.

ITALY.

(Proclaimed November 23, 1871. Term, 5 years. Requires 12 months' notice.)

Favored-nation Clause.

Art. XXIV. The United States of America and the Kingdom of Italy mutually engage not to grant any particular favor to any other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing the same compensation if the concession was conditional.

Real Estate.

Art. XXII. As for the case of real estate, the citizens and subjects of the two contracting parties shall be treated on the footing of the most favored nation.

Reciprocal Rights.

Article I. There shall be between the territories of the two high contracting parties a reciprocal liberty of commerce and navigation.

MADAGASCAR.

(Proclaimed March 13, 1883. Term indefinite; may be altered with consent of both contracting parties.)

Property Rights.

Art. III. According to the laws of Madagascar from all time, Madagascar lands cannot be sold to foreigners, and, therefore, citizens and proteges of the citizens of the United States of America are prohibited from purchasing lands in Madagascar; but still they may be permitted to lease or rent lands, houses or storehouses for a term of months or years, mutually agreed upon between the owners and United States citizens, not exceeding 25 years for one term; but the lessee, or owner of the lease, at the expiration of the term, may, if he should wish to do so, and can agree with the lessor (proprietor of the land), renew the lease by periods not exceeding 25 years for any one term; and the conditions agreed upon by the parties for such renewals are to be inserted in the lease. However, every renewal must be acknowledged at the time of making it before the proper authorities, as hereinafter provided in section 9 of this article for executing leases for lands and houses; and the same fee may be exacted.

Sec. 2. United States citizens and proteges shall be permitted to build houses and magazines, of any material desired, on land leased by them, according to the agreement with the owner; and when the lease contains

a condition permitting the lessee to remove the building and fixtures so constructed by him, the same shall be removed within three months after the final expiration of the lease; otherwise they shall become the property of the owner of the land.

Sec. 3. This privilege of leasing lands and buildings thereon by United States citizens and proteges shall not be construed as a right to build fortifications of whatever nature, nor to mine lands; and should any minerals be accidentally found on such lands they are to be left to the disposition of Her Majesty's Government, and no agreement will be valid between parties to avoid this clause relative to minerals.

Sec. 18. (Allowing free passage within all but three parts of the island, all leading up to the following): * * * and in fact, to be entitled to all privileges of commerce or other business, calling or profession granted to the most favored nation, so long as they do not infringe upon the laws of Madagascar.

Sec. 19. The subjects of Her Majesty the Queen of Madagascar shall enjoy the same privileges in the United States of America.

MEXICO.

(No treaty with present Government; new Government not even recognized; presume new deal will be made shortly.)

MOROCCO.

(Proclaimed July 18, 1787. Superseded by new treaty proclaimed January 30, 1837. Term, 50 years, with 12 months' notice from either to terminate.)

Favored-nation Clause.

Art. IV. The commerce with the United States shall be on the same footing as is the commerce of Spain, or as that with the most favored nation for the time being; and their citizens shall be respected and esteemed, and have full liberty to pass and repass our country and seaports whenever they please, without interruption.

Art. XXII. If an American citizen shall die in our country, and no will shall appear, the consul shall take charge of his effects; and if there be no consul, the effects shall be deposited in the hands of some person worthy of trust, until the party shall appear who has the right to demand them; but if the heir be present, the property shall be delivered to him without interruption; and if a will shall appear, the property shall descend agreeably to that will, as soon as the consul shall declare the validity thereof.

NASSAU.

(Proclaimed January 26, 1847. No term given.)

Real Estate.

Art. II. * * * where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may reasonably be prolonged according to circumstances, and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction.

Art. IV. In the absence of heirs, the same care shall be taken, provisionally, of such real and personal property, as would be taken in like case of property belonging to natives of the country, until the lawful owner, or person who has a right to sell the same, according to article II, may take measures to receive or dispose of the inheritance.

NETHERLANDS.

No treaty concerning property rights; the treaty of 1782 covered this, but it was abrogated by the overthrow of the Netherlands Government in 1795; several consular agreements since, arbitration, trade-marks, extradition, etc., as late as 1908, but nothing on the question under discussion.

ORANGE FREE STATE.

(Proclaimed August 23, 1873. Term, 10 years; may be terminated at any time by 12 months' notice.)

Reciprocal Rights.

Article I. The citizens of the United States and the citizens of the Orange Free State shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions of the contracting parties. No pecuniary or other more burdensome condition shall be imposed upon them than upon the citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject. The foregoing privileges, however, shall not extend to the enjoyment of political rights.

Property Rights.

Art. III. In case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property, there shall be accorded to said heir or other successor, such term as the law will permit to sell such property and he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the Government any other charges than those which in a similar case would be paid by an inhabitant of the country in which the real estate may be situated.

Most-favored-nation Clause.

Art. VII. Each of the contracting parties hereby engages not to grant any favor in commerce to any nation which shall not immediately be enjoyed by the other party.

OTTOMAN EMPIRE.

(Proclaimed October 29, 1874.)

Article I. Foreigners are admitted, by the same privilege as Ottoman subjects, and without other restrictions, to enjoy the right of holding real estate whether in the city or the country, throughout the Empire, with the exception of the Province of the Hedjaz, by submitting themselves to the laws and regulations which govern Ottoman subjects, as hereafter stated.

Art. II. Foreigners, proprietors of real estate in town or country, are in consequence placed on terms of equality of Ottoman subjects in all things that concern their landed property.

Art. IV. Foreigners have the privilege to dispose, by donation or by testament, of that real estate of which such disposition is permitted by law; as to that real estate of which they may not have disposed, or of which the law does not permit them to dispose by gift or testament, its succession shall be governed in accordance with Ottoman law.

PARAGUAY.

(Proclaimed March 12, 1860. Term, 10 years, subject to termination upon 12 months' notice from either party.)

Most-favored-nation Clause.

Art. III. The two high contracting parties hereby agree that any favor, privilege, or immunity whatever, in matters of commerce or navigation which either contracting party has actually granted, or may hereafter grant, to the citizens or subjects of any other state, shall extend, in identity of cases and circumstances, to the citizens of the other contracting party, gratuitously, if the concession in favor of the other state shall have been gratuitous, or in return for an equivalent compensation, if the concession shall have been conditional.

Property Rights.

Art. XIV. The citizens of the two contracting parties residing in the territories of the other shall enjoy, in regard to their houses, persons, and properties, the protection of the Government in as full and ample a manner as native citizens.

PERU.

(Proclaimed November 7, 1888. Term, 10 years, and until one year's notice has been given by either.)

Property Rights.

Art. XI. The citizens of either of the high contracting parties shall have the full powers and liberty to dispose of their personal and real estate and effects of every kind and description, within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their heirs or representatives, being citizens of the other party, shall succeed to the said personal and real estate and effects, whether by testament or by intesto, and may take possession of the same themselves or by others acting for them, and dispose of the same at their pleasure, paying such dues only as the citizens of the country, wherein said estate and effects may be, shall be subject to pay in like cases.

PORTUGAL.

(Proclaimed April 24, 1841. Term, 6 years, with right to give notice of termination 12 months in advance of termination.)

Most-favored-nation Clause.

Art. V. It is agreed by the high contracting parties that, whenever there may be lawfully imported into any or all of the ports of the Kingdom and possession of Portugal, in vessels of any foreign country, articles of the growth, produce, or manufacture of a country, other than that to which the importing vessel may belong, the same privilege shall immediately become common to vessels of the United States of America, with all the same rights and favors as may, in that respect, be granted to the most favored nation. And reciprocally, in consideration thereof, Portuguese vessels shall thereafter enjoy in the same respect, privileges, rights, and favors to the corresponding extent, in the ports of the United States of America.

Art. XIII. If either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where freely granted to such other nation, or on yielding the same compensation or an equivalent, *quam proxime*, where the grant is conditional.

Art. XII. If, on the death of any person holding real estate within the territories of one of the high contracting parties, such real estate would by laws of the land descend on a citizen or subject of the other party, who, by reason of alienage, may be incapable of holding it, he shall be allowed the time fixed by the laws of the country; and, in case the laws of the country actually in force may not have fixed a time, he shall then be allowed a reasonable time to sell or otherwise dispose of such real estate.

SALVADOR.

(Proclaimed March 13, 1874. Term, 10 years, unless notice given of intention to terminate; such notice must be 12 months in advance—runs on from year to year without such notice.)

Favored-nation Clause.

Art. II. The United States of America and the Republic of Salvador, desiring to live in peace and harmony with all the nations of the earth, by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing compensation in the same amount if the concession was conditional.

Right to Buy and Hold Real Estate and Reciprocal Rights.

Art. III. The two high contracting parties, being likewise desirous of placing the commerce and navigation of their respective countries on the liberal basis of perfect equality and reciprocity, mutually agree that the citizens of each may frequent the coasts and countries of the other, reside therein, and shall have power to purchase and hold lands, and all kinds of real estate and to engage in all kinds of trade, manufactures, and mining, upon the same terms with the native citizens and shall enjoy all the rights and privileges and exemptions in navigation, commerce and manufactures which native citizens do or shall enjoy, submitting themselves to the laws, decrees, or usages there established to which the native citizens are subjected. But it is understood that this article does not include the coasting trade of either country, the regulation of which is reserved by parties respectively, according to their own separate laws.

Disposal of Property.

Art. XIII. * * * The citizens of each contracting party shall have the power to dispose of their personal goods or real estate within the jurisdiction of the other, by sale, donation, testament or otherwise; and their representatives, being citizens of the other party, shall succeed to their said personal goods or real estate, whether by testament, or *ab intestato*; and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such dues only as the inhabitants of the country wherein said goods are shall be subject to pay in like cases.

SERBIA.

(Proclaimed December 27, 1882. Term, 10 years, with one year's notice of termination.)

Property Rights.

Art. II. In all that concerns the right of acquiring or possessing or disposing of every kind of property, real or personal, citizens of the United

States of America in Serbia, and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the most favored nation; within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage, contract, testament, inheritance or in any other manner whatever without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on subjects of the most favored state. They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subject to pay any higher duties than those payable under similar circumstances by natives or subjects of the most favored state.

SWEDEN.

(Proclaimed September 25, 1783. Term, 15 years; superseded by the treaty of September 4, 1816. This one had terminated by limitation; but the articles under discussion were revived in the September 4, 1816, treaty noted, and also in the one of July 4, 1827, and are now in effect. A note dated November 20, 1905, from the Swedish minister at Washington to our Secretary of State acknowledges the joint treaties signed when Sweden and Norway were one State, only excepting and denying any responsibility thereafter for Norway's pledges.)

Most-favored-nation Clause.

Art. II. The King and the United States agree mutually not to grant hereafter any particular favor to other nations in respect to commerce and navigation which shall not immediately become common to the other party, who shall enjoy the same freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional.

Property Rights.

Art. VI. The subjects of the contracting parties in the respective States may freely dispose of their goods and effects either by testaments, donation or otherwise, in favor of such persons as they think proper; and their heirs, in whatever place they may reside, shall receive the succession even *ab intestato*, either in person or by their attorney, without having occasion to take out letters of naturalization. (This word "effects" will have to be interpreted as real estate, at least as being part of one's effects; find no other reference in either the old Swedish-Norway treaty, nor in their separate treaties.—A. V. H.)

SWITZERLAND.

(Proclaimed November 9, 1855. Term, 10 years, with usual 12 months' notice.)

Property Rights.

Art. V. The citizens of each of the contracting parties shall have the power to dispose of personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they think proper, paying no more charges than those to which the inhabitants of the country wherein the said property is situated shall be required to pay in a similar case. In the absence of heir, heirs, or other successors, the same care shall be taken by

the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

The foregoing provisions shall be applicable to real estate situated within the states of the American Union, or within the cantons of the Swiss Federation in which foreigners shall be entitled to hold or inherit real estate.

TWO SICILIES.

(Proclaimed December 10, 1856. Term, 10 years; 12 months' notice required to terminate. Runs on forever without such notice.)

Property Rights.

Art. VII. As to any citizen of either of the high contracting parties dying within the jurisdiction of the other, his heirs, being citizens or subjects of the other, shall succeed to his personal property, and either to his real estate or the proceeds thereof, and whether by testament or *ab intestato*; and may take possession thereof, either by themselves or by others acting for them; and may dispose of the same at will, paying to the profit of the respective Governments such dues only as the inhabitants of the country wherein the said property is shall be subject in like cases.

Reciprocal Rights.

Art. VI. The citizens and subjects of each of the contracting parties, residing in the states of the other, shall be entitled to carry on commerce, arts, or trade, and to occupy dwellings, shops, and warehouses, and to dispose of their property of every kind, whether real estate or personal, by sale, gift, exchange, or in any other way, without hindrance or obstacle.

Most-favored-nation Clause.

Art. XV. If either of the high contracting parties shall hereafter grant to any other nation any particular favor, privilege, or immunity, in navigation or commerce, it shall immediately become common to the other party, freely, whether it is freely granted to such other nation, and on yielding the same compensation, or a compensation as nearly as possible of proportionate value and effect, to be adjusted by mutual agreement, when the grant is conditional.

VENEZUELA.

(Proclaimed September 25, 1861. Term, 8 years. Usual 12 months' notice.)

Reciprocal Rights.

Art. III. The citizens of the contracting parties shall be permitted to enter, sojourn and settle, and reside in all parts of the territories, and such as may wish to engage in business shall have the right to hire and occupy warehouses, provided they submit to the laws, as well general as special, relative to the rights of traveling, residing, or trading.

Property Rights.

Art. V. When, on the decease of any person holding real estate within the territory of the other party, such real estate would, by the law of the land, descend on a citizen of the other, were he not disqualified by alienage, the longest term which the laws of the country in which it is situated will permit shall be accorded to him to dispose of the same; nor shall he be subjected, in so doing, to higher or other dues than if he were a citizen of the country wherein such real estate is situated.

Most-favored-nation Clause.

Art. IX. If, however, either party shall hereafter grant to any other nation any particular favor in navigation or commerce, it shall immediately become common to the other party, freely, where it shall be freely granted to such other nation, or for the same equivalent when the grant shall be conditional.

WURTEMBERG.

(Proclaimed December 16, 1844.)

Property Rights.

Art. II. Where, on the death of any person holding real property within the territories of one party such real property would descend on the citizen of the other, were he not disqualified by alienage, such citizens or subjects shall be allowed two years to sell the same, which term may be reasonably prolonged according to circumstances and to withdraw the proceeds without molestation, and exempt from all duties of detraction.



